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No. 87-

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

VOLUME I

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5669

MARVIN K. HAMMON, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

MARION S. BARRY, JR., MAYOR, D.C., et al.

No. 85-5670

KEVIN MICHAEL BYRNE, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

THEODORE R. COLEMAN, D.C. FIRE CHIEF, et al.

No. 85-5671

MARVIN K. HAMMON, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

MARION S. BARRY, JR., MAYOR, D.C., et al.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 84-00903,
85-00782 and 85-00797)

Argued October 22, 1986

Decided February 27, 1987

William Bradford Reynolds, Assistant Attorney General, Department of Justice, with whom *Michael A. Carvin*, Deputy Assistant Attorney General, *David K. Flynn* and *Walter W. Barnett*, Attorneys, Department of Justice, were on the brief for appellant in Nos. 85-5669, 85-5670 and 85-5671.

Charles L. Reischel, Deputy Corporation Counsel, with whom *John H. Suda*, Acting Corporation Counsel was on the brief for appellee, District of Columbia, in Nos. 85-5669, 85-5670 and 85-5671.

Joan A. Burt for appellees, Marvin K. Hammon, et al., in Nos. 85-5669, 85-5670 and 85-5671.

George H. Cohen, Michael H. Gottesman, Robert M. Weinberg and *Jeremiah A. Collins* were on the brief for *amicus curiae*, Local 36, International Association of Fire Fighters, AFL-CIO, urging reversal in Nos. 85-5669, 85-5670 and 85-5671.

William L. Robinson, Richard T. Seymour and *Roderick V.O. Boggs* were on the brief for *amicus curiae*, Lawyers' Committee for Civil Rights Under Law, et al. urging affirmance in Nos. 85-5669, 85-5670 and 85-5671.

Before: MIKVA, STARR and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STARR.

Dissenting opinion filed by *Circuit Judge* MIKVA.

3

STARR, *Circuit Judge*: These consolidated cases come before us on appeal from the District Court's judgment upholding the hiring provisions of an affirmative action plan developed by the District of Columbia Fire Department pursuant to a consent decree. The United States challenges the race-conscious hiring provisions of the plan on the grounds that they violate Title VII of the Civil Rights Act of 1964 and the equal protection component of the Due Process Clause of the Fifth Amendment. We conclude that, because the District of Columbia has failed to establish the requisite predicate of discrimination and did not consider, let alone employ, alternatives to its race-preference plan, the hiring provisions cannot stand.

I

A

The genesis of these cases can be traced to October 1980, when two black D.C. Firefighters, Messrs. Holmes and Sheffield, filed complaints with the District of Columbia Office of Human Rights (OHR) alleging that the D.C. Fire Department had, beginning in October 1979, acted in a racially discriminatory manner. The alleged unlawful acts included failing to give black residents notice and information about vacancies in the Fire Department and, more relevantly for our purposes, using unvalidated tests for hiring of entry-level firefighters.

In June 1981, without the benefit of an evidentiary hearing, the Director of OHR issued a "Summary Determination" finding a *prima facie* case of discrimination in the Fire Department's recruitment, hiring, and promotion practices and in its implementation of policies. In August 1981, the OHR Director ordered that 60 of the next 70 entry-level firefighter positions be filled with minorities, with entrance-on-duty dates retroactive to April 27, 1981, the date when 23 firefighters, only two of whom were black, were hired. Noting the District's admission that it was "not in compliance with D.C. Law

1-63, as it related to the racial make up [of] the work force of the District of Columbia," [1] the Director mandated "that minorities shall be given preference in *all* new hiring and promotions until the traditional patterns of racial segregation have been eliminated; minorities within the Department are no longer under-represented at all grade levels; *and minorities employed by the Department approximate the percentage of minorities in the work-force for the District of Columbia.*" Defendant's Appendix ("D.A.") at 34 (emphasis added).

The District appealed from this ruling. In due course, the designated Appellate Officer issued a supplanting order remanding the Holmes-Sheffield complaints on grounds of incomplete consideration by OHR. The Appellate Officer directed that, in view of the seriousness of the allegations, a public evidentiary proceeding should be conducted. A lengthy set of adjudicatory hearings thereafter ensued before a Hearing Examiner.

B

Throughout the OHR administrative proceedings, the District adamantly denied any discrimination whatsoever. Indeed, the District's position as pertinent to our

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[1] D.C. Law 1-63 contains two provisions of note:

> Every District government agency shall develop and submit to the Mayor and Council an affirmative action plan.

D.C. Code Ann. § 1-508 (1981).

> The goal of affirmative action in employment throughout the District government is and must continue to be, full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to, Blacks, Whites, Spanish-Speaking Americans, Native Americans, Asian Americans, females and males. As used in §§ 1-507 to 1-514, "available work force" means that total population of the District of Columbia between the ages of 18 and 65.

Id. § 1-507.

purposes was simple and straightforward: that its entry-level examination, Test 21, which had been employed throughout the 1970's, was valid. The District emphasized that Test 21 had successfully run the validation gauntlet both in 1971 (OHR) and 1979 (OPM),[2] had passed constitutional muster in *Washington v. Davis*, 426 U.S. 229 (1976), and that the pass-fail level of the new examination that replaced Test 21, the Firefighters Service Test (FST), had been set at a modest level. Specifically, the passing mark for the new examination was no more than the "score one could expect to receive if one answered the questions randomly."[3] Proposed Findings, *supra* note 2, ¶ 19, at 16. The District further maintained that, save for the hiring of the 23 entry-level firefighters early in 1981, the Department's entry-level test and other hiring procedures had no adverse impact on blacks.[4] *Id.* ¶ 27, at 19.

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[2] As to the use of Test 21 throughout the 1970's, the District maintained that no evidence had been offered as to what, if any, adverse impact Test 21 had produced. To the contrary, the District asserted that "[e]ven as early as 1971 the OHR conducted a validation analysis on Test 21 and found that there was a high correlation between scores on Test 21 and job performance." Respondents' Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") ¶ 7 at 11 (citing Intervenor Local 36, Exhibit 67). According to the District, a subsequent validation analysis, employing job performance measures, conducted by OPM in April 1979 (six months prior to the filing of the Holmes-Sheffield complaints), led to the conclusion "that Test [21] was [a] valid prediction of future-job performances." *Id.*

[3] The District agreed that the test should be employed solely for pass/fail screening purposes, not as a rank ordering device:

> Given the high level of adverse impact from rank order use of the FST, the evidence submitted to support its validity for that purpose is inadequate.

Id. ¶ 24 at 18; *see also id.* ¶ 26.

[4] Likewise, the District denied any discrimination with respect to promotions, including any adverse impact occasioned

After 50 days of trial, the OHR Hearing Examiner rejected the lion's share of the Hammon-Sheffield allegations. He noted specifically that "the complainants failed to introduce any evidence in the record to show the job qualifications for the entry-level firefighters job either intentionally discriminated or had an adverse impact against Blacks." Opinion of Hearing Examiner, Patrick Kelly ("HE Opinion") ¶ 23, D.A. at 44. And he further found "no evidenciary [sic] basis . . . in the record" for the allegation that the District had discriminated in its recruitment efforts." *Id.* ¶¶ 27, 28, 47. D.A. at 45-46.[5]

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by any of its procedures. *Id.* ¶¶ 42, 44, 51, 52-58 (no adverse impact); ¶¶ 57-59 (job-relatedness of promotion test); ¶¶ 64-66 (non-discriminatory access to exam manuals); ¶¶ 70-73 (effects of assignments to Fire Prevention Division); ¶¶ 84, 88-89, 90-93 (specific promotion decisions, and operation of the Promotion Board); ¶¶ 101-103 (job assignments and training); ¶¶ 107-111 (statistical evidence of *complainants'* expert "show[ed] very small differences of achievement of Blacks and Whites in the DCFD. Even in the salary area Blacks and Whites were close.").

[5] Similarly, the Hearing Examiner found the Fire Department's promotion process to be free of discrimination. As to the promotions examination, which had been vigorously attacked by the complainants, the allegations of adverse impact on minorities were found to be "unsupported on the basis of this record." *Id.* ¶ 102. In addition, the Hearing Examiner found the promotions examination to be job-related, *id.* ¶ 103, and concluded that "in developing promotional examinations the Fire Department has made efforts to produce examinations that are objective, job-related and fair to all members of the Department." *Id.*

Other charges of discrimination were found to be entirely without foundation. *See, e.g., id.* ¶ 111 ("no evidence of any discrimination by the Promotion Board in performing its functions"); ¶ 113 ("no evidence of discrimination with respect to the functions of the Promotion Board and the Fire Chief in making promotions to the ranks of Sergeant, Lieutenant and Captain."); ¶ 118 ("no basis to conclude that any discrimination of any type exists in promotions to the level of Battalion Fire Chief and none is found."); ¶ 122 (no basis

The Hearing Examiner did, however, find what he deemed to be two blemishes on the Fire Department's record. Of particular relevance to the issues now before us, *the Department's racial composition, by its own admission, failed to reflect the racial composition of the adult population of the District of Columbia.*[6] *Id.* ¶ 153. The significance of this perceived shortcoming, as we shall presently examine in greater detail, was that the Fire Department was not in conformity with the strictures of applicable D.C. law requiring racial balance in all employment categories. *See supra* note 1. In addition, the Hearing Examiner concluded that the Fire Department's entry-level examination, coupled with the Department's pre-hiring investigative processes, had an adverse impact on minorities in the initial hiring effected in early 1981. *Id.* ¶ 9, D.A. at 68.

Because of the importance of the Department's validation and use of its entry-level examination to the issues presented by this appeal, we pause to observe that his-

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for finding discrimination against Deputy Chief Joseph Kitt); ¶ 123 (no basis for concluding that "any discrimination exists in the selection for positions above the rank of Battalion Fire Chief"); ¶ 124 (no evidence of adverse impact in the selection of technicians); ¶ 130 ("[C]omplainants' claim with respect to study time in the Fire Prevention Division discriminating against Blacks is totally unsubstantiated by evidence in this record."); ¶ 152 (complaint that black firefighters "have been denied access to [examination] manuals on the basis of their race is unsubstantiated by this record and totally devoid of merit"); ¶¶ 155-63 (allegations of two incidents of denials of promotions found to be "without merit"); *see also* ¶¶ 169-70, 174, 177, 180 & 186. *Cf. Bishopp v. District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986) (D.C. Fire Department discriminated against *white* males by denying them promotions).

[6] The Department "admitted that they [sic] were not in compliance with D.C. Law 1-63 as it relates to the racial make-up of the work force of the District of Columbia." *Id.*; *see supra* note 1.

tory, as recounted in the unchallenged and exhaustive opinion of the OHR Hearing Examiner.

C

Prior to 1980, entry-level testing for D.C. Fire Fighters was not the responsibility of the District of Columbia at all. Rather, that function was carried on by the *federal government*, initially by the old Civil Service Commission and subsequently (after the landmark 1978 legislation) by the Office of Personnel Management. Over the years, OPM (and its predecessor) had administered Test 21, the pencil-and-paper test that had successfully withstood constitutional challenge in *Washington v. Davis*, 426 U.S. 229.[7] Because black applicants tended to cluster near the passing score of Test 21, rank ordering caused white applicants to be "inserted on the registers over Blacks." H.E. Opinion ¶ 29, D.A. at 46. *But, rank ordering was not in fact employed in the Fire Department's hiring process during the reign of Test 21.* Rather, at the request of the Fire Department itself, OPM (and its predecessor) changed the process "in the early 1970 [sic] and subsequently every register was exhausted before a new examination would be administered," *id.*, D.A. at 47. According to the Fire Department, this change was sought specifically in order to increase minority representation in the D.C. Fire Fighter ranks. *Id.*

At the dawn of the 1980's, Test 21 was replaced with the Firefighters Service Test. According to the OHR findings, OPM and the Fire Department developed the FST "in order to have a test that had better predictability of job performance than Test 21." *Id.* ¶ 30, D.A. at 47. The FST was developed over a five-year period, during which two OPM officials, Dr. Paul van Rijn and

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[7] Test 21 was administered to candidates for the Metropolitan Police Department as well. In *Washington v. Davis*, the Supreme Court rejected the challenge that a standardized test, specifically Test 21, was *constitutionally* infirm by virtue of its disproportionately adverse impact on blacks.

Ms. Sandra S. Payne, conducted a Criterion Related Validity Study.[8] In addition to this considerable period of gestation, the new exam was developed in compliance with the EEOC's Proposed Uniform Guidelines, which were concurrently in formation at that agency.

In 1980, OPM turned over the FST to the Fire Department for the latter's use without making "any recommendation to [the District of Columbia Office of Personnel] concerning . . . adverse impact . . . *because OPM believed the job relatedness of the job analysis and criterion measures would not only validate use of the FST, but would also validate its use as a rank ordering advice* [*sic*] *in the selection procedure.*" *Id.* ¶ 33, D.A. at 48 (emphasis added).

Despite OPM's position, considerable evidence was adduced at the OHR hearings to the effect that the FST was not valid as a rank ordering device (as opposed to pass/fail). *Id.* ¶ 36, D.A. at 49 (review performed in March 1981 by Personnel Decisions Institute); *id.* ¶ 37-62, D.A. at 49-54 (study performed by Dr. Richard S. Barrett). Significant among the perceived flaws in the OPM validation effort was its failure to get at the actual job requirements of the firefighter mission, which, it was argued, called for the test formulator "to go out and take a look and see what actually happens" on the job. *Id.* ¶ 43, D.A. at 51. More fundamentally, the District's expert, Dr. Barrett, "questioned whether it was possible

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[8] The EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1986), provide suggested standards for employment test validity studies. The guidelines endorse three types of validity studies: content validity studies, construct validity studies, and criterion-related validity studies. A criterion-related validity study, such as was conducted by Dr. van Rijn and Ms. Payne, consists of "empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance." *Id.* § 1607.5B. The technical standards for such studies are described at § 1607.14B.

to develop a valid multiple choice test to measure a Firefighter Job." *Id.* ¶ 57, D.A. at 53.

D

Based on this testimony and other evidence of record, the Hearing Examiner, notwithstanding the professional effort devoted to developing and validating the FST and its undisputed pedigree in the halls of the federal personnel establishment, concluded broadly that rank-order use of the exam results should not be employed by the Department without satisfying the following standard:

> A rank order system should be used only if there is convincing evidence that the employer benefits by using a rank order system.

Id. ¶ 63, D.A. at 54.

The "adverse impact" on blacks of employing a rank-order system had been realized, the Hearing Examiner concluded, in November 1980 when the results of the FST's inaugural administration were tallied. At that time, the D.C. Office of Personnel developed a "Certificate of Eligibles" containing the names of the individuals attaining the top 100 scores on the examination. Although 74.35 percent of the test takers were black, and only 21.5 percent were white, the top-ranking Certificate included the following racial composition:

72—Whites
27—Blacks
2 —Hispanics

Id. ¶ 80, D.A. at 58-59.

With this Certificate in hand (which, it will be noted, consisted of 101, not 100, applicants), the Fire Department processed the prospective employees by conducting a background check. That check, which it appears ordinarily took longer to complete for black applicants, was carried out without written operating procedures by of-

ficials with no prior experience in background checks. *Id.* ¶ 82, D.A. at 59. Although the Hearing Examiner found no overt act of discrimination in this respect, he considered the process itself, which resulted in a disproportionate number of white hires in the initial 1981 hiring,[9] to be an unvalidated component of the selection procedure. *Id.* ¶ 83, D.A. at 60.

These two perceived flaws in the hiring process were the sole problem areas identified by OHR after the lengthy and thorough process of adjudicatory hearings. Accordingly, the Hearing Examiner limited his recommendation at the conclusion of the 50-day trial to four: *first*, that the D.C. Office of Personnel "properly validate the [FST] in accordance with the [EEOC's] Uniform Guidelines on Employee Selection;" *second*, that the D.C. Office of Personnel and the Fire Department establish written processing procedures to ensure that "minority applicants are processed through the background investigation and medical examination components of the Selection Process and presented to the Appointment Board at the same rate as White applicants"; *third*, that the "date of entry be the same for all applicants who are selected as Firefighters from the 1980 [examination] regardless of the actual date of entry" [10] and, critically, that "the selection

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[9] Speed apparently played a pivotal role in the selection process. According to the Hearing Examiner:

> It is clear from the record that the determining factor as to whether an applicant was hired in this first group was not his/her place on the list, but how quickly he was processed by the Police and Fire Clinic.

Id. ¶ 84, D.A. at 60.

[10] This provision was not, however, framed as a remedial order to eliminate discrimination. Indeed, the Hearing Examiner expressly provided that the date of entry was to be used only for future promotional eligibility "and shall not be construed as entitling any applicant selected pursuant to these

list of applicants developed as a result of the 1980 examination shall remain in effect until exhausted"; and *fourth*, that the Fire Department submit to OHR an "Affirmative Action Plan ["AAP"] which will eliminate racial disparity within the Department." *Id.* ¶¶ 1-4, D.A. at 69-70.[11] The Examiner's fourth recommendation was the one destined to figure large in the events ahead, including the present litigation.

The Hearing Examiner's recommendations were affirmed in all material respects by the designated Appellate Officer, and a Final Order was duly issued in November 1983. The District was thus exonerated of all charges of discrimination, save for (1) adverse impact *if* rank-ordering use were made of the FST results[12] and (2) the use of unstandardized processing procedures. Notwithstanding this virtually clean bill of health, the District was charged with fashioning an AAP going beyond erasing the two blemishes to the more

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recommendations to retroactive governmental benefits, such as back pay, insurance, etc." *Id.* ¶ 3 n.*, D.A. at 69 n.*.

[11] The Hearing Examiner also issued a standard anti-retaliation admonition and made recommendations about attorney's fees and monitoring the AAP and selection procedures.

[12] The Hearing Examiner found that the District "was aware of the possible adverse impact that would be caused if the FST was used operationally, but decided to use the test operationally as a rank ordering selection procedure." *Id.* ¶ 34, D.A. at 49. It must be remembered, however, that the District administered the FST in November 1980 and employed it as a rank-order device in January 1981, *before* OPM's validity study was impeached. At that time, the District thought that the test was valid, and therefore properly administered and used for rank-order purposes *despite* its possible adverse impact. Upon learning that the FST was not validated for rank-order usage, the District promptly adjusted its procedures.

sweeping goal of eliminating racial "imbalance" in the Department. *The District was also directed to exhaust completely the 1980 list of eligibles and to give all firefighters appointed from the 1980 list the same date of hire.* No review was sought by any party in the District of Columbia courts, thereby rendering the November 1983 Order the final resolution of the Holmes-Sheffield cases.

E

As one might suspect, the Fire Department's needs for new firefighters continued during the foregoing, somewhat protracted proceedings. Accordingly, hiring of entry-level firefighters continued during and after the OHR proceedings that we have just chronicled. The results of that hiring process, which we believe considerably worthy of note, are as follows: in 1982, 67.5 percent of new hires were black; in 1983, 80.5 percent were black; and in 1984, 78.6 percent were black.

In sum, the evidence of discrimination in the record was as follows: The Hearing Officer, after comprehensive adjudicatory proceedings, found that, as of early 1982, there was "insufficient factural [sic] evidence provided in the record to show that the job qualifications for the entry level firefighters intentionally discriminated or had an adverse impact against Blacks who met the minimum qualifications. . . ." H.E. Opinion ¶ 4, D.A. at 65. The Hearing Officer found that "[b]ased upon the evidence provided in this record, there is insufficient evidence to support Complainant's [sic] claim that Respondents have discriminated against Blacks and District residents in their recruiting efforts. . . ." *Id.* ¶ 5, D.A. at 65. Indeed, the Hearing Examiner found that the District had conducted an aggressive recruiting campaign *directed* at blacks. *Id.* ¶¶ 24-28, D.A. at 44-46. Since the Hearing Examiner's unchallenged findings were issued, the District has *stepped up* its hiring of blacks.

F

Notwithstanding this evidence of propriety in the District's hiring practices, the Hammon plaintiffs filed a discrimination suit in federal district court in March 1984. *Hammon v. Barry*, C.A. No. 84-0903 (D.D.C. filed Mar. 22, 1984). The catalyst for this suit was the District's then-imminent plan to administer the FST once again, occasioned apparently by the near exhaustion of the 1980 list of eligibles. The complaint sought, among other things, "an Order requiring defendants to develop an affirmative action plan to eliminate racial disparity within the District of Columbia Fire Department," Prayer for Relief ¶ 4, *see also* ¶¶ 8-9, and an order prohibiting the District from pursuing its plan to readminister the FST in late March 1984 or using that exam in the selection of new firefighters. *Id.* ¶ 10; *see also* Complaint ¶ 1, 34, 35.

On March 23, 1984, the District Court denied plaintiffs' request for a temporary restraining order against readministering the FST.[13] Two months later, on May 23, 1984, the court entered a consent decree. In that decree, the District agreed to validate an entry-level firefighter examination and other components of the selection process in accordance with the EEOC's Uniform Guidelines, and to submit a proposed affirmative action plan to the court and OHR. In addition, the decree authorized the District to hire from the 1984 examination list only after exhausting the 1980 eligible list. Of especial note, paragraph 11 made clear that the decree was "neither an admission nor a finding that the [District] defendants have violated any law or regulation regarding prohibited discrimination."

In February 1985, the District submitted to the court its Affirmative Action Plan. The Plan addressed both

[13] The test was thereafter administered in March, April, and July 1984.

hiring and promotions.[14] Alarmed by the racial quotas in promotions imposed by the AAP, eight white incumbent firefighters (the Byrne plaintiffs) and their union (Local 36) filed suit challenging the Plan's promotion provisions as violative of Title VII and the equal protection component of the Fifth Amendment's Due Process Clause.[15] *Byrne v. Coleman*, C.A. No. 85-0872 (D.D.C. filed Mar. 8, 1985). Three days later, the United States likewise filed suit challenging both the hiring and promotion provisions of the plan. *United States v. District of Columbia*, C.A. No. 85-0797 (D.D.C.). The three cases were consolidated, and the parties filed cross-motions for summary judgment on the basis of stipulated facts.

On April 1, 1985, after a one-day hearing, the District Court filed an opinion and order upholding the hiring provisions, but invalidating the promotion provisions as violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982).[16] *Hammon v. Barry*, 606 F. Supp. 1082 (1985). In sustaining the hiring provisions under Title VII, the court relied on the factors governing a plan's permissibility identified in *United States Steel Workers v. Weber*, 443 U.S. 193 (1979). Specifically, the court determined that the plan would

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[14] Under the hiring portion of the AAP, 12 certificates (lists) of approximately 120 candidates each are developed from separate lists of white males, white females, black males, black females, Hispanic males, and other males based on the candidates' scores on the FST. The AAP requires that the composition of each certificate approximate that of the group of persons who pass the FST: blacks (60%), whites (35.1%), Hispanics (2.4%), females (7%), and others (2.6%). Finally, the AAP mandates that each academy class of firefighters be composed of at least 60% blacks and 5% females.

[15] The latter provision is, of course, triggered by virtue of the D.C. Fire Department's status as a public entity.

[16] The court's order, which precluded implementation of the plan, was stayed insofar as the hiring provisions were concerned on April 26, 1985.

not unnecessarily trammel the interests of whites because they had little if any expectation or entitlement to a job with the Fire Department; that the plan was sufficiently temporary in nature (eighteen months); and that although alternatives to the race-preference plan were apparently not considered, none suggested at the one-day hearing appeared to be feasible. *Hammon*, 606 F. Supp. at 1092-94. The court also emphasized that the AAP's hiring provisions were "designed to break down an old pattern of racial segregation and hierarchy." *Id.* at 1090. To reach this conclusion, the court looked back a generation ago to the early 1950's when the Fire Department was officially segregated; in addition, the court recited facts as to (1) the existing percentages of blacks and whites in the work force, and (2) the current percentages of black and white applicants. It concluded from those two items of evidence that "vestiges" of discrimination remained. *Id.* at 1086-87, 1092.

The court also upheld the hiring provisions against constitutional attack. Observing that "the 'interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination' " constitutes a compelling governmental interest, the trial court concluded that OHR's "finding that the entry level test adversely affected black applicants" created "a sufficient predicate for the implementation of race-conscious affirmative relief." *Id.* at 1095 (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978)). The court then determined that the plan was "sufficiently narrowly tailored" because "the hiring provisions of the Fire Department's AAP ask white applicants to shoulder only a minor burden." *Id.* at 1096.

Both the District and the United States appealed. On September 5, 1985, this court dismissed at the District's instance its appeal on the promotions issue and denied the Hammon appellees' motion to dismiss the United States' appeal on the hiring issue. The promotions provi-

sions of the Affirmative Action Plan thus stand condemned; it is only the hiring provisions that are now before us.

II

The United States' challenge to the race-preferential hiring provisions raises both statutory and constitutional issues. The United States, supported by the Byrne plaintiffs (the eight white firefighters), charge that the hiring remedy sanctioned by the District Court violates both Title VII of the Civil Rights Act of 1964 and the equal protection component of the Due Process Clause.

We observe preliminarily that the decisional law is infected with imprecision as to the differences between statutory and constitutional analysis (and, indeed, as to the proper mode of analysis itself) in the public employer setting. In the years since the three landmark affirmative action cases of the 1970's, to which we shall presently turn, the Supreme Court has faced both Title VII and Equal Protection questions only in *Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019 (1986).[17] There, the Court stated that in a Title VII case, "a court should consider whether affirmative action is necessary to remedy past discrimination in a particular case before imposing such measures, and . . . the court should also

[17] In *Sheet Metal Workers*, the Court held that the affirmative action order requiring the union to admit a certain percentage of nonwhites to union membership satisfied the requirements of Title VII. *Sheet Metal Workers*, 106 S. Ct. at 3052. The Court was then faced with the petitioners' constitutional claim, which it resolved without addressing whether the Constitution placed limits on that which Title VII would otherwise permit. *Id.* at 3052-53. As we presently note in more detail, it seems to us that for obvious reasons Congress would not have intended that Title VII's scope extend to unconstitutional employment practices. In addition, we observe that in at least one other instance, the Court has determined that a provision of the Civil Rights Act of 1964 is commensurate with the demands of the Constitution. *Bakke*, 438 U.S. at 287, 325.

take care to tailor its orders to fit the nature of the violation it seeks to correct." *Id.* at 3050. In constitutional analysis, it is clear that the Court requires that a race-conscious remedy (1) be designed to achieve a "compelling" or "significant" governmental interest, and (2) be properly tailored to meet that interest. The rigor with which a court is obliged to scrutinize the government's professed interest and the remedy's relationship to that interest, however, has not yet been agreed upon by a clear majority of the Court. *See, e.g., id.* at 3052; *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1846, 1857, 1861, 1867 (1986).

It would appear that, as to a public employer, the general analytic framework is quite similar at the constitutional and statutory levels. In addition, certain other basic principles immediately suggest themselves. *First*, Congress obviously did not contemplate that Title VII would permit that which the Constitution forbids. Such a state of affairs would obviously be entirely repugnant to basic principles of constitutionalism and the supremacy of the higher law of the Constitution. *Second*, under well-established principles of restraint, courts should address questions of statutory propriety before turning to the gravely sensitive task of measuring the lawfulness of a public body's action against the demands of the Constitution itself. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (" 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' " (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905))).

With these principles in mind, we set forth our analysis of the racially preferential hiring provisions under the rubric of Title VII. However, we do not feel it improper in this difficult area to seek guidance, as appropriate, from pertinent principles articulated by the Supreme Court in the constitutional setting. And, as to

one issue, we are constrained to look to the demands ordained by the Constitution itself.

III

A

It is elementary in our law that a predicate of discrimination must exist before race-conscious measures may lawfully be employed voluntarily or imposed by court decree. The decisional law uniformly holds that a record of discrimination constitutes the crucial condition precedent to the use of racial preferences. As chronicled below, it is established beyond the slightest doubt that this predicate is indispensable to the use, as here, of non-victim-specific forms of racially based remedies.

We begin with the three affirmative action cases handed down by the Supreme Court last Term. In all three cases, the members of the Court emphasized time and again the need to justify remedies that classify individuals on the basis of the immutable characteristic of race. Such remedies, we have been taught, are not to be invoked lightly; to the contrary, racial preferences are to be employed cautiously and reluctantly. *See Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. at 3050 & n.48. In *Sheet Metal Workers*, for example, Justice Brennan, speaking for himself and Justices Marshall, Blackmun, and Stevens, put the point quite succinctly in holding that a court may order, "in appropriate circumstances, affirmative race conscious relief *as a remedy for past discrimination.*" *Id.* at 3034 (emphasis added). The same theme is prominently featured in Justice Brennan's opinion for the Court in the *Vanguards* case, *Local No. 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986). There, in holding that Title VII does not preclude the entry of a consent decree that provides relief to persons who are not victims of discriminatory practices, the Court observed that the District Court had found, based on evidence of record, an historical pattern of racial

discrimination in promotions within the Cleveland Fire Department. *Id.* at 3070. So too, the Sixth Circuit on appeal in that case had found "such relief justified by the statistical evidence presented to the District Court and *the City's express admission that it had engaged in discrimination.*" *Id.* (emphasis added). Emphasizing the importance of voluntary compliance with the vital objectives of Title VII, a theme first sounded seven years previously in *Weber*, the *Vanguards* Court upheld the power of federal courts to sanction a race-conscious remedy where the parties to the consent decree are "seeking to eradicate race discrimination." *Id.* at 3070.

Six weeks prior to *Sheet Metal Workers* and *Vanguards*, the Court handed down the *Wygant* decision, where Justice Powell, writing for the plurality of Chief Justice Burger, then-Justice Rehnquist and Justice O'Connor, stated:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, *the Court has insisted upon some showing of prior discrimination by the governmental unit involved* before allowing limited use of racial classifications *in order to remedy such discrimination.*

106 S. Ct. at 1847 (emphasis added).

This bedrock requirement of our law was not challenged by the dissenting Justices in *Wygant*, save one (and that apparently only in the particular setting of education).[18] Indeed, Justice Marshall, writing in dissent

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[18] Justice Stevens concluded that "it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future." *Id.* at 1867 (Stevens, J., dissenting). The justification for racial line-drawing in Justice Stevens' view was supplied by the "public interest in educating children for the future," rather than by "some sort of special entitlement [of minority teachers] to jobs as a remedy for sins committed in the past." *Id.* The present case, of course, does not involve

for himself and Justices Brennan and Blackmun in *Wygant*, decried the absence of a record and the efforts of the parties "to try their case before this Court." *Id.* at 1858. The absence of record evidence led the three dissenting Justices to complain that "the plurality has too quickly assumed the absence of a legitimate factual predicate, even under the plurality's own view, for affirmative action in the Jackson schools." *Id.* We acknowledge the obvious ambiguity in that carefully crafted statement, but we observe that the *Wygant* dissenters went on to emphasize that "while racial distinctions are irrelevant to nearly all legitimate state objectives that are properly subject to the most rigorous judicial scrutiny in most instances, *they are highly relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination.*" *Id.* at 1891 (emphasis added).

Indications to the same effect abound in the fourteen opinions filed in the three cases from last Term. Justice Powell in *Sheet Metal Workers*, for example, indicated that race-conscious relief could lawfully run to non-victims "in cases involving particularly egregious conduct," *id.* at 3054; *see also id.* at 3055 ("The finding by the District Court and the Court of Appeals that petitioners have engaged in egregious violations of Title VII establishes, without doubt, a compelling governmental interest sufficient to justify the imposition of a racially classified remedy."). Justice White, who authored the Court's opinion two Terms ago in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), emphasized in his *Vanguards* dissent that a predicate of racial discrimination was necessary to warrant racial preferences:

> Under the present law, an employer may adopt or be ordered to adopt racially discriminatory hiring or

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the unique and sensitive area of education, leaving us without the government's fundamental interest in education to support the use of racial considerations. *See also id.* at 1852; *Regents of University of California v. Bakke*, 438 U.S. 265, 311-15 (1978) (opinion of Powell, J.).

> promotion practices favoring actual or putative employees of a particular race *only as a remedy for its own prior discriminatory practices disfavoring members of that race.*

106 S. Ct. at 3081 (emphasis added).

Justice White's criticism that the *Vanguards* majority had paid "scant attention to this necessary predicate for race conscious practices," *id.*, was met with a vigorous disavowal by Justice O'Connor, who along with Justice Powell joined to provide the *Vanguards* majority. Justice O'Connor emphasized that "the Court's opinion does not hold or otherwise suggest that there is no 'necessary predicate for race conscious practices.'" *Id.* at 3080 (quoting dissenting opinion of White, J.).

Quite apart from the specific expressions in this respect, the Court's staunch refusal to sanction racial quotas or orders effecting a strict racial balance suggests that, to be valid, race-conscious remedies must in fact be remedial in nature. They are not to promote the Utopian goal, as some might see it, of a society in strict proportional racial balance in every employment setting, from brain surgery to basketball. Indeed, if the core element of remediation for past discriminatory practices is unnecessary, we are at a loss to explain the purpose informing the *Sheet Metal Workers* plurality's elaborate exegesis of the principle that affirmative action is aimed at *dismantling the structure of prior discrimination.* 106 S. Ct. at 3031-57.

There must, in essence, be a direct nexus between the race-preferential action and the remediation of discrimination. The *Sheet Metal Workers* plurality issued a stern warning in this respect:

> Although we conclude that § 706(g) [of Title VII, 42 U.S.C. § 2000e-5(g)] does not foreclose a district court from instituting some sorts of racial preferences *where necessary to remedy past discrimination,*

> we do not mean to suggest that such relief is always proper.

Id. at 3050 (emphasis added). Quite to the contrary, Justice Brennan emphasized, a "court should exercise its discretion with an eye toward *Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force.*" *Id.* (emphasis added). This broad admonition was followed immediately by the plurality's specific teaching that "[i]n the majority of Title VII cases, the court will not have to impose affirmative action as a remedy for past discrimination, but need only order the employer or union to cease engaging in discriminatory practices and award make-whole relief to the individuals victimized by these practices." *Id. See id.* at 3036.

Racial preferences, the *Sheet Metal Workers* plurality emphasized, are the exception, not the rule. Indeed, Justice Brennan's comprehensive opinion for the plurality identified only two permissible exceptions: where the employer or labor union "has engaged in *persistent or egregious discrimination*," and where racial preferences "may be necessary *to dissipate the lingering effects of pervasive discrimination.*" *Id.* at 3050 (emphasis added).[19] The record before the *Sheet Metal Workers* Court abundantly satisfied the demands mandated by the discrimination predicate: the discriminatory practices of the New

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[19] The plurality indicated that decision was not needed as to "[w]hether there might be other circumstances that justify the use of court-ordered affirmative action." *Id.* But, returning in the same breath to the ubiquitous theme of "discrimination as predicate," the plurality instructed the inferior courts to "consider whether affirmative action is necessary to remedy past discrimination in a particular case," *id.*, and articulated a principle to which we will presently turn in the text, namely that "the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct." *Id.* at 3050-51 (citation omitted).

York City union were "pervasive and egregious." *Id.* at 3057.[20]

The *Vanguards* case, which as we noted before held narrowly that § 706(g) of Title VII does not preclude entry of a consent decree that provides relief to non-victims, likewise involved a clear, undisputed history of discrimination. After years of *unsuccessfully* defending against various claims of discrimination, Cleveland embraced a different posture:

> "[T]he City of Cleveland had eight years . . . of having judges rule against [it].
>
> You don't have to beat us on the head. We finally learned what we had to do."

Vanguards, 106 S. Ct. at 3067. The *Vanguards* record thus included not only evidence of " 'a historical pattern of racial discrimination' " but an "express admission [by the City] that it had engaged in discrimination." *Id.* at 3070. *See supra* text at 14.

It cannot go unnoticed, therefore, that in both instances in which the Supreme Court sustained racial preferences last Term, the predicate of discrimination was firmly established, with plenty of room to spare.[21]

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[20] Discrimination of the grossest sort by Local 28 cannot be gainsaid. Over two decades previously, the New York State Commission for Human Rights had ordered the union, which had never had a single black member or apprentice, to cease its blatantly discriminatory practices. Justice Powell was moved, in concurrence, to characterize the union's history of discrimination as "contemptuous." *Id.* at 3054. "It would be difficult," he wrote, "to find defendants more determined to discriminate against minorities." *Id.* at 3055. This is the stuff of which racial-preference remedies are, under present law, lawfully made.

[21] We hasten to add that the Court in *Vanguards* did not pass final judgment on Cleveland's plan. Instead, the Court held more narrowly that as a matter of law § 706(g) of Title VII did not ban federal district court approval of the consent

This should come as no surprise. Last Term's outpouring by a sharply divided Court on the nettlesome subject of affirmative action was not, of course, written on a blank slate. Indeed, the opinions were written against the background of the three watershed, racial-preference cases of the 1970's, *Bakke*, [22] *Fullilove* [23] and *Weber*, which, upon analysis, all share the salient characteristic of *impaired access by certain (but by no means all) minorities to specific, identifiable educational, commercial, or job opportunities.* Tellingly, the remediation theme was prominently featured in all three decisions. Nothing in the various opinions in those cases suggest judicial sanctioning of race-based social engineering schemes; rather, it was the task of remedying discrimination that warranted race-conscious remedies redounding to the benefit of non-identifiable "victims" of discrimination.

In *Bakke* itself, a deeply divided Court justified the consideration of race in the admissions process only by virtue of the perpetuation of impaired access by certain minorities to Davis' Medical School. Likewise, the various opinions in *Fullilove* emphasized that the 10 percent government contract set-aside program at issue there was remedial in nature, specifically designed to reduce past racial and ethnic discrimination. In his plurality opinion, Chief Justice Burger dwelt on the fact that Congress created the set-aside program only in the wake of long experience with government contracts and after determining that a variety of impediments to equal opportunity existed in that arena. Indeed, previous Congressional

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decree. The ability of the union or others to challenge the decree under § 703 or the Fourteenth Amendment was expressly left unresolved. *Id.* at 3080; *see also id.* (O'Connor, J., concurring).

[22] 438 U.S. 265.

[23] *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

efforts aimed at improving minorities' record in bidding for government contracts had been unavailing. *Fullilove*, 448 U.S. at 463-67. The race-preference regime at issue was, as it were, a last resort, shielded in no small measure by the Court's substantial deference to Congress, and particularly Congress' exercise of its broad powers under both the General Welfare Clause and section 5 of the Fourteenth Amendment. As the *Fullilove* plurality emphasized, the Court was faced with "the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 490. But, even in view of this unparalleled reservoir of governmental power in a free society, the Court demanded that the legislative action be *remedial* in nature. This bedrock requirement was emphasized by Justice Powell in his concurring opinion:

> [The set-aside] is justified as a *remedy* that serves the compelling governmental interest in eradicating the continuing effects of *past discrimination* identified by Congress.

Id. at 496 (emphasis added).

Unlike *Bakke* and *Fullilove*, *Weber* did not involve a *governmental* classification based on race; rather, that decision addressed whether Congress had so regulated the private sector as to prevent an employer and union from *voluntarily*[24] creating a set-aside program for blacks seeking to enter craftworker training programs. In concluding that Congress in Title VII had not chosen to

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[24] The *Weber* Court expressly chose not to address the contention that the affirmative action plan at issue there represented an attempt by Kaiser and the Union to comply with Exec. Order No. 11246. *Id.* at 209. That contention, needless to say, touched rather directly on the asserted voluntariness of the plan. *Cf. Miranda v. Arizona*, 384 U.S. 436 (1964).

prohibit outright such private arrangements, *Weber*'s five-member majority [25] reasoned that the aims of the Kaiser-Steelworkers plan were commensurate with the purpose animating Congress in passing Title VII—to open up employment opportunities and thus eliminate *the remaining vestiges of discrimination.* As it was destined to do again seven years later in *Vanguards* and *Local 28*, however, the Court in *Weber*, pointedly emphasized the narrowness of its holding—"Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn *all* private, voluntary, race-conscious affirmative action plans." *Id.* at 208 (emphasis added).

The Kaiser-Steelworkers affirmative action plan at issue in *Weber* fell within permissible limits because, like Title VII itself, the plan "was designed to break down old patterns of racial segregation and hierarchy." *Id.; see also id.* at 204. That invidious pattern was graphically demonstrated by two facts: *first*, "blacks had long been excluded from craft unions," *id.* at 198, thus making Kaiser's situation in Grammercy, Louisiana, similar to that obtaining in New York City in *Sheet Metal Workers*; and *second*, a gross statistical disparity existed in that "prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the [Kaiser] plant were black, even though the work force in the . . . area was approximately 39% black." *Id.* Clearly, the non-governmental, race-preference plan in *Weber* was "remedial" in the broad sense of opening up to minorities theretofore closed channels of employment opportunities.

Thus, as we read the law, remediation of present discrimination (or extant results of its insidious prior operation) is the absolutely indispensable element of the legality of remedies which differentiate human beings on the basis of race.

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[25] We observe that the majority included the late Justice Stewart, a dissenter in *Fullilove*, and Justice White, the author of *Stotts* and a dissenter in *Sheet Metal Workers.*

B

In addition to the threshold requirement of discrimination, the law contains yet another hurdle before a race-preference program may properly be employed: the remedy crafted to address a violation must be tailored to fit that violation.

This requirement is not new. The principle is rooted in the rich traditions of equity and firmly buttressed by common sense. If, by way of modest example, Smith constructs a building on Whiteacre that intrudes slightly onto Jones' Blackacre, the remedy that fits the violation, one would naturally think, would be to require Smith to remove the portion of his building unlawfully situated on Blackacre. It would seem excessive and wrong to require Smith to demolish the entire building, rather than just the offending part of the structure, for such a "remedy" would partake more of the nature of a sanction or punishment upon Smith for trenching on Blackacre.

This principle holds true in remedying violations of statutory and constitutional rights, as well as rights protected at common law. Thus, when, for example, Title VII liability is established, the remedy must be crafted carefully to cure the violation that activates the judiciary's remedial arsenal. The Court made this broad rule clear in the school busing cases. Although approving *in principle* mandatory transportation of school children to effect desegregation in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Court emphatically did not sanction appellate abdication of reviewing with care the powers exercised by federal trial courts in respect of a public educational system. Rather, the Supreme Court directed the lower courts to view with grave caution sweeping "remedies" that disrupt basic institutions of our society in order to ensure that the mode of vindicating basic rights fits the violation. *See, e.g., Milliken v. Bradley*, 418 U.S. 717 (1974).

The Supreme Court has employed this sound and venerable principle in the arena of state-imposed or -sanctioned racial preferences. Although we recognize full well that the Justices have not been of one mind as to the proper degree of scrutiny to apply to governmental line-drawing by race,[26] all members of the Supreme Court appear to agree that courts must examine with great care the nexus between violation and remedy. For, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting).

Wygant provides a strong basis for this conclusion. Justice Powell, joined by Chief Justice Burger, then-Justice Rehnquist, and Justice O'Connor, made the point this way in his plurality opinion: "[The means chosen] must be 'narrowly tailored to the achievement of the

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[26] The Court has invoked the doctrine of strict scrutiny (Chief Justice Burger, Justice Powell, Justice White, then-Justice Rehnquist and Justice O'Connor); an intermediate but nonetheless demanding standard of review (Justices Brennan, Marshall, and Blackmun); and a strict requirement of procedural fairness (Justice Stevens in *Fullilove* and *Wygant*).

However, where, as here, the racial classification is employed by the political majority to disadvantage the political minority, it would appear that Justices Brennan, Marshall, and Blackmun would also apply the full panoply of "strict scrutiny" analysis, including the "narrowly tailored" prong. Indeed, in their collective *Bakke* dissent, they opined that "any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Bakke*, 438 U.S. at 361. *See also id.* at 357; *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring). *Cf. Munro v. Socialist Workers Party*, 107 S. Ct. 533 (1986).

We see nothing in the opinions t uggest the truly remarkable proposition that, in a free society, a "discrete and insular minority" is destined forever to remain precisely that, even when by virtue of demographic shifts yesterday's minor-

goal.' "[27] *Wygant*, 106 S. Ct. at 1846 (quoting *Fullilove*, 448 U.S. at 480). In *Wygant*, this meant that even if the Jackson, Michigan School Board had engaged in discriminatory conduct, the reformed Board was not at liberty to remediate in any fashion it chose. The Board's remedial impulses were constrained by countervailing considerations. Indeed, the layoff provision that deprived Wendy Wygant of her teaching job was not, the plurality concluded, "a legally appropriate means of achieving even a compelling purpose." *Id.* at 1852.

In addition to the lead opinion in *Wygant*, Justice O'Connor in concurring expressly embraced the "narrowly tailored" standard. *Id.* at 1852. Three other Justices, to be sure, advocated the weaker standard of "substantially related." But even under that less daunting yardstick a "rational relationship" between ends and means would appear not to be enough; rather, the remedy must be "tailored" substantially to the actual accomplishment of what Justices Brennan, Marshall, and Blackmun describe as "important government objectives." *Id.* at 1847. Finally, Justice Stevens would require "scrupulous fairness" in adopting the practice for procedure and inquire whether the method employed "is specifically designed to achieve [the] objective." *Id.* at 1869-70.[28]

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ity becomes today's majority. And, we would think, when control of the political process is obtained, one would be hard pressed to discern any institutional failures in the political process disabling the new majority. *Cf.* J. Ely, *Democracy and Distrust* 73-104 (1980).

[27] Three of those four Justices flatly rejected the standard of "reasonableness" as the appropriate guide for measuring the legality of the specific remedial action. A closer fit than "reasonableness" was required.

[28] This court has recognized the importance of tailoring the remedy to fit the violation as well. In *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982), the court stated in the context of Title VII:

IV

We now apply these principles to the case at hand.

A

The record before us shows beyond dispute that the predicate of discrimination has not been established in this case. The issue, indeed, is not even close. The District Court entered the race-conscious remedy, incorporated in the consent decree, in March 1985. We are entirely at a loss, however, to discern any act of hiring discrimination, much less any pattern or practice of discrimination, that the court was trying to remedy. The

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In carefully honing a quota, the court should be guided by at least four important considerations. First, it should draw the quota in as limited and short-term a fashion as possible, consistent with effective eradication of discriminatory practices. Second, the court should target the quota specifically at the discrimination to be brought to an end. Third, to the extent possible, it should avoid infringing on the competing, legitimate concerns of others. Finally, the court should consider whether alternative, equally effective methods could supplement or supplant resort to a quota. *See United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981).

The *Thompson* court approved in principle a quota-type remedy in the context of a government employer that had demonstrated a marked "inability or unwillingness to recognize discrimination" which had been blatantly visited upon female employees, and in an industry characterized by "longstanding and pervasive discrimination. . . ." *Id.* at 295. The court was quite clear that such remedies "must be fashioned and used gingerly, with care to see that they wound as little as possible." *Id.* at 294. The court then went on to direct the trial court as follows: "the decree should be tailored to the discrimination to be corrected. . . ." *Id.* at 295. *Accord Segar v. Smith*, 738 F.2d 1249, 1293-95 (D.C. Cir. 1984) (despite "pervasive" discrimination by the government employer, *id.* at 1264, 1289, the device of promotion goals and timetables "must be used cautiously").

facts are staggeringly to the contrary: the overwhelming majority of new hires in the Fire Department in recent years have been black. As we mentioned above, in 1983, no less than 80.5 percent of new hires were black. In 1982, 67.5 percent of new hires were black. These numbers clearly indicate that the Fire Department is not engaged in hiring practices that discriminate against blacks. Indeed, they powerfully suggest that the District Court's approval of the racial preference plan had nothing to do with "break[ing] down old patterns of racial segregation and hierarchy." *Weber*, 443 U.S. at 208.

In addition, no serious contention has been advanced that this record contains the slightest indication of ongoing racial discrimination in hiring by the Fire Department. And no wonder, in light of the findings of the Office of Human Rights. Those conclusions, the reader will recall, are overwhelmingly to the effect that no discriminatory conduct infects the Fire Department's practices and procedures (save arguably, for the April 1981 hiring). What is more, the District of Columbia does not stand before us like Cleveland in *Vanguards* as a self-confessed discriminator, or like Local 28 in *Sheet Metal Workers* as a lawless, obdurate bastion of blatantly discriminatory practices. Nor is it like Kaiser, with its craft union ranks overwhelming white, a powerful present-day demonstration of a prior regime of discrimination.

Instead, as we have seen, the District has steadfastly and persuasively protested its innocence of any discriminatory activity. And, more importantly, the record before us shows that the District has in fact conducted its hiring in a nondiscriminatory manner. To return briefly to the facts, between 1969 and 1980, an average of 41.8 percent of those hired by the Fire Department each year were black. In 1981, when the District employed what it believed was a test validated for use as a rank-ordering device, the Department hired only 23 new firefighters,

two of whom were black.[29] Since 1981, however, an average of no less than 75.5 percent of those hired each year have been black.[30]

We pause to observe that, as the District Judge noted, conflicts exist in the case law with respect to the proper

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[29] Under a view most favorable to the Hammon plaintiffs, the District engaged in discriminatory hiring practices in 1981 when it hired the 23 firefighters from the initial Certificate of 101 candidates who had achieved the highest scores on the FST during the prior year. In addition, the District carried out the actual processing of these candidates in a manner that impacted adversely on the applications of blacks. These, however, are the sole elements of "discrimination" in the record. And it is not disputed that the District immediately took steps to remediate these perceived shortcomings. First, the District fully exhausted the list of those who had successfully taken the FST, which the reader will recall was virtually everyone, rather than relying upon a rank order cut-off score. Second, it appears (and is unchallenged in this litigation) that the District remedied its processing procedures to eliminate that element of adverse impact on black candidates. These steps were either completed or well under way before the present litigation was even filed, not to mention the date of the court-authorized quota hiring provisions framed in the spring of 1985.

[30] Thus, the District of Columbia Fire Department has been hiring blacks at an average rate of close to 50 percent per year since 1969. This bottom-line result scarcely bespeaks what *Weber* described as "a continuing pattern of racial segregation and hierarchy." This is especially true since until 1980 the District recruited broadly from the entire metropolitan area, the population of which is almost 70 percent white. Beginning in 1980, the Fire Department stepped up its recruiting efforts targeted at residents of the District, a development that coincided with the enactment of a D.C. law requiring new hires to become residents of the District of Columbia within six months of hiring. Theretofore, no residency requirement obtained for firefighters wishing to serve in the Nation's Capital.

definition of the relevant labor market.[31] In upholding the quota plan here, the District Court opted in favor of the applicant pool, which was 74.53 percent black in 1980 and 64.6 percent black in 1984, as opposed to the population or labor pool of the Washington Metropolitan Area. (Roughly half of those hired by the Department at entry levels are from the suburbs). According to the

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[31] Under the case law, the critical comparative group is that of the *qualified applicant pool*, which may or may not be the *entire work force* in the area. Thus, when the job qualifications involved are ones that relatively few possess, statistical presentations that fail to focus on those qualifications do not have significant probative value. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977). *See also Cook v. Boorstin*, 763 F.2d 1462, 1469 (D.C. Cir. 1985) (case law establishes that "the percentage of minority employees selected for a given position should be compared to the percentage of minority candidates in the pool of persons *qualified for that position*"); *Metrocare v. Washington Metro. Area Transit Auth.*, 679 F.2d 922, 930 (D.C. Cir. 1982) ("[S]tatistics must compare the percentage of blacks hired for given jobs with the percentage of blacks qualified for those positions."); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 586 n.29 (1979).

Because the entry-level qualifications for a D.C. firefighter are apparently minimal, however, the District Court's use of the applicant pool was not necessarily incorrect. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977); *Hazelwood*, 433 U.S. at 308 n.13. We note, however, that the District Court failed to perform any meaningful analysis with respect to the applicant pool, once it had identified that pool as the relevant labor market. The court merely recited the percentage of blacks who applied in 1980 and 1984 and then found that "the plan's hiring quota of 60% blacks is reasonable." *Hammon*, 606 F. Supp. at 1092. The court did not even compare the applicant percentages to the percentages hired, let alone determine whether the 1980 and 1984 applicant flows had any relevance to past hiring percentages, in light of the District's aggressive 1980 campaign to recruit blacks.

1980 Census, only 29.3 percent of the metropolitan area population within the eligible age range (20 to 28 years of age) for entry-level positions are black. But even relying on the applicant pool, we are at a loss to understand how the District Court arrived at its implicit conclusion that the District's hiring practices had been discriminatory. As we have seen, the average percentage of black hires each year since 1981 has been greater than even the 74.35 black percentage in the 1980 applicant pool. And, the percentage of black hires is grossly, favorably disproportionate to the percentage of blacks in the eligible population (a fact likely attributable to the District's recent campaign aggressively to recruit black firefighters).[32] *See supra* note 28.

On this record, there were, in sum, no present day impediments to black hiring. There were no relics from yesteryear to overcome. There were no vestigial rem-

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[32] Notably, the complaint in the present lawsuit and the underlying administrative proceeding before the Office of Human Rights did not allege violations prior to the fall of 1979.

The District Court nonetheless relied on the fact that the Fire Department had been segregated in the early 1950's. The significance of that fact to a present-day *hiring* remedy is nowhere elucidated, nor is the slightest logical nexus between the generation-old violation and the present-day remedy apparent. To the contrary, the historical fact of segregation in that unhappy era preceded *Brown v. Board of Education*, 347 U.S. 483 (1954), which as every schoolchild knows reaffirmed the bedrock constitutional right of all Americans not to be subjected to line-drawing on grounds of race. Other than semi-ancient history, the District Court looked to the raw numbers of minorities in various supervisory positions, principally at more senior levels save for the most senior. That data, of course, goes to the issue of discrimination in promotions, not hiring. And, it will be recalled, the District Court's Solomonic judgment overturned the *promotions* portion of the affirmative action plan, a question that neither the District nor the Hammon plaintiffs have brought before us.

nants demanding to be extirpated root and branch. The Plan's hiring provisions were not designed to dismantle the structure of discrimination. That dismantlement had long since occurred. The crucial condition precedent—discrimination in need of remediation—was therefore wanting. In its absence, the Plan cannot lawfully stand.

B

Upon analysis, the only discrimination-related concern articulated by the District in this court is its professed desire to avoid the adverse impact of a rank-order use of its hiring test, the FST. This modest goal, upon which the District confers the fancy label of "compliance" relief,[33] is painfully incompatible with the fundamental

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[33] "Compliance" relief is a concept articulated by the Second Circuit. In *Guardians Ass'n v. Civil Serv.*, 630 F.2d 79 (2d Cir. 1980), that court drew a distinction between what it characterized as "compliance relief" and "affirmative relief." The court asserted:

> Compliance [relief] involves restricting the use of an invalid exam, specifying procedures and standards for a new valid selection procedure, and authorizing interim hiring that does not have a disparate racial impact.[25] Affirmative relief involves interim hiring at any ratio greater than what is necessary just to avoid a disparate racial impact and any required long-term hiring targets or ratios.

Id. at 108. In footnote 25, the court suggested:

> An example [of compliance relief] would be an interim minority hiring ratio of 30%, where the minority percentage of the applicant pool or the relevant work force is also 30% ....

Id. According to the court, certain circumstances warrant compliance relief, while others (more egregious) would give rise to affirmative relief:

> When it has been established that a selection procedure has been unlawfully used, an appropriate compliance remedy should forbid the use of that procedure, or its disparate racial impact, and may properly assure the

requirement of "narrow tailoring," to which we now turn.

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establishment of a lawful new procedure. When it also appears that the employer has discriminated prior to the use of the challenged selection procedure, then it may also be appropriate to fashion some form of affirmative relief, on an interim and long-term basis, to remedy past violations (citations omitted).

Id. It seems to us that our colleagues in New York are drawing a distinction between when the court can merely remedy the violation at hand (compliance relief) and when it can implement a more global remedy (affirmative relief). This distinction, it would seem, is simply a different way of stating the requirement that the remedy be tailored to fit the violation. In either instance, it is clear that the court requires a present-day Title VII violation as a threshold matter. In *Guardians*, the court had found that the employer's use of an exam with significant disparate racial impact violated Title VII, and was sufficient to invoke the court's equitable compliance relief powers. The court reiterated the requirement of a Title VII violation in *Kirkland v. New York State Dept. of Correctional Services*, 711 F.2d 1117 (2d Cir. 1983). As the court put it, "[s]imply stated, the remedies provided by a Title VII settlement, especially those containing race-conscious relief, must be substantially related to the objective of eliminating the alleged instance of discrimination. . . ." *Id.* at 1132. *See also Berkman v. City of New York*, 705 F.2d 584, 595 (2d Cir. 1983).

The Second Circuit's "compliance relief" is therefore not available, as the District asserts, "simply to avoid a disparate racial impact." D.C. Brief at 17. Instead, it is available under Second Circuit law only to avoid the disparate racial impact resulting from a present Title VII violation. As we are not faced with *any* Title VII violation, so that a remedy is necessary to bring the District back into compliance with Title VII, we reject outright the District's attempt to characterize the AAP as "compliance relief." And, we observe that even if the April 1981 hiring from the Certificate of Eligibles were considered a Title VII violation, the remedy employed—exhaustion of the list of those who passed the exam—surely brought the District back into compliance with Title VII.

Oral argument in this case graphically demonstrated that the District has been unimaginative in the extreme in seeking to avoid a regime of racial preferences. Indeed, the District's posture is downright anomalous. It professes a keen interest in having a pencil-and-paper test for entry-level firefighters, yet it used taxpayer money to hire an expert (Dr. Barrett) who lambasted the very idea of employing such an exam for firefighters.[34] As if that oddity were not enough, the District set the pass-fail level of the exam at a remarkably humble level—*at a score where mere random answering would garner a passing mark.* Dart-throwing methods of test answering sufficed under the District's screening methodology. Not surprisingly, under the District's benign egalitarianism, almost everybody who showed up to take the test in 1980 and 1984 passed it.

The District nonetheless complains that its hands are tied. It earnestly wants to employ a pencil-and-paper test, it says, but is effectively precluded from selecting among those who passed the test on a random (or lottery) basis because the District would, the District bemoans, lose Congressional funding if it were to do so. *See* Continuing Appropriations, 1985, Pub. L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984). The District claims that it therefore must hire on a rank-order basis, but has been unable thus far to validate the FST for that use. The District argues that various dangers lurk everywhere were it to employ some other test, so it is bound to stay the course with the FST.

The District's protestations ring hollow. *Indeed, the District has refused even to consider seriously alterna-*

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[34] The District commissioned Dr. Richard S. Barrett to review the adequacy of the Criterion-Related Validity Research Study conducted by OPM. H.E. Opinion ¶ 37, D.A. at 49-50. See text *supra* at 9-10. During the course of Dr. Barrett's explication of the study's deficiencies at the 50-day trial, he expressed doubt as to the possibility of developing a valid multiple choice test for firefighter hiring. *Id.* ¶ 57, D.A. at 53.

tive tests which the Hammon plaintiffs themselves strenuously maintain are employed satisfactorily and nondiscriminatorily in other jurisdictions.[35] These tests, the Hammon plaintiffs urge, are readily at hand if the District would but avail itself of them. The United States echoes the Hammon plaintiffs' protestations in this respect.

Other alternative courses of action, not based on race, also suggest themselves upon a moment's reflection. For instance, the District could have exhausted the 1984 eligibility list. Or, the District could have moved in the intervening years to validate the FST for rank-order use (as the experts at OPM thought had already been done as of 1979). Or, of course, the District could have ceased to use the test, especially since, as we have seen, the passing score was set at such a meek and lowly level that the exam results, at least in the lower strata, would seem virtually meaningless.

Thus, even assuming *arguendo* that the District's hiring procedures constituted a "violation" necessitating remedial action, its race-based hiring methods were not narrowly tailored to accomplish its remedial purposes. The District, had it paused to consider the matter, could surely have found an avenue of relief more congruent with the demands of Title VII and the Due Process Clause. *Cf. Wygant*, 106 S. Ct. at 1852.

Quite apart from the District of Columbia's failure, we are constrained to conclude that the District Court in hastily approving the affirmative action plan likewise

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[35] Courts have found tests employed by fire and police departments valid on a number of occasions. *See, e.g., Clady v. County of Los Angeles*, 770 F.2d 1421, 1434 (9th Cir. 1985); *Detroit Police Officers Ass'n v. Young*, 446 F. Supp. 979, 1007-08 (E.D. Mich. 1979); *Friend v. Leidinger*, 446 F. Supp. 361, 367-75 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978); *Bridgeport Guardians v. Bridgeport Police Dep't*, 431 F. Supp. 931, 936-39 (D. Conn. 1977).

fell into error. The court's action does not comport with Justice Brennan's recent reiteration of the well-established principle that "the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct." *Sheet Metal Workers*, 106 S. Ct. at 3050. In its opinion, the District Court took pains to note: "[T]he Court is concerned that reasonable alternatives were not seriously discussed." *Hammon*, 606 F. Supp. at 1094. Nevertheless, the court went on to uphold the hiring provisions, finding an "absence of clear options." This will not do. The District Court has a *duty* to determine whether a workable, race-neutral alternative exists, and if one does exist, to rule in favor of that course of action. The District Court may not blindly embrace a racially preferential scheme at the first invitation. It must act, in Justice Brennan's words, "cautiously." Circumspection, not docket management, must be the guiding principle in these sensitive cases involving as they do basic human rights and human dignity.

In sum, the conclusion irresistably suggests itself that the race-preferential hiring scheme approved by the District Court is not, as the law commands, narrowly tailored to cure the "violation." Indeed, it is not tailored at all. It cannot stand.

C

One might be led to wonder why the District of Columbia would embark upon this course of insisting upon administering an unvalidated test, with the pass-fail mark set at a meaningless level, and then employing a quota remedy to avoid the effects of any rank-order usage of that "test," especially when other tests, acceptable to the pla ntiffs, were at hand. The answer to this enigma lies not just in the District's desire to avoid a lottery but in its effort to achieve a strict racial balance in its workforce in compliance with District of Columbia law. We turn now to examine that effort, and whether

fidelity to the strictures of D.C. law can justify a racial quota.

In 1976, the District of Columbia City Council passed D.C. Law 1-63. That measure provides that every agency of the District of Columbia government "shall . . . develop an affirmative action plan." *See supra* note 1. Such plans, the law mandates, shall have as their goal "full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to, Blacks, Whites, Spanish-Speaking Americans, Native Americans, Asian Americans, females and males." The "available work force of the District of Columbia" is sweepingly defined in terms of raw population. Specifically, as set forth in D.C. Code § 1-507, " 'available work force' means the total population of the District of Columbia between the ages of 18 and 65."

This statutory objective could not be clearer. Each affirmative action plan is to achieve a specific racial balance.[36] The Affirmative Action Plan approved by the lower court in this case is equally clear. "The long-range goal of the Fire Department in the hiring of entry-level personnel is expressed in D.C. Code 1-507." The parties to this litigation expressly recognized as much. The parties' Statement of Stipulated Material Facts at ¶ 53 trumpets with admirable brevity: "The AAP was intended to achieve compliance with D.C. Law 1-63."

That proportional representation was being sought is scarcely surprising. Back in 1981 in the OHR proceedings, the Fire Department candidly admitted that it was "not in compliance with D.C. Law 1-63, as it related to

[36] This feature did not slip by unnoticed. The bill that ultimately was enacted as D.C. Law 1-63 was vetoed by then-Mayor Walter Washington on grounds of unconstitutionality.

the racial make-up [of] the work force of the District of Columbia." OHR Director's Summary Determination at 7. It is abundantly clear that at least for the past five years, the District has assiduously sought to achieve racial representation in the Fire Department workforce proportional to that in the District's population at large. It has, in brief, faithfully sought to bring itself into conformity with the explicitly race-conscious demands of D.C. law.

This is an impermissible goal under our law. To draw lines based on race, our Constitution demands that government have the most weighty reason for doing so, one that is "compelling" or at least "important." A government-inspired or -mandated effort to attain racial balance not only fails to satisfy that daunting standard, but is itself suspect. As Justice Powell stated in *Bakke*, "[a governmental] purpose . . . to assure [the representation of] . . . some specified percentage of a particular group merely because of its race . . . must be rejected not as insubstantial but as facially invalid." *Bakke*, 438 U.S. at 307. And that position, as we read the cases, represents the law of the land.

Since *Bakke*, the principle has been forcefully reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* Such preferences are forbidden by the Constitution. In *Fullilove*, Justice Stewart, in dissent, stated that "since the guarantee of equal protection immunizes from capricious governmental treatment 'persons'—not 'races'—it can never countenance laws that seek racial balance as a goal in and of itself." *Fullilove*, 448 U.S. at 529. But we need not repair to dissents, no matter how forceful, to discern the governing principle that seeking racial balance will not do. As we saw more recently in the Title VII setting of *Sheet Metal Workers*, Justice Brennan admonished that "the

court should exercise its discretion with an eye towards Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force." *Sheet Metal Workers*, 106 S. Ct. at 3050; *see also id.* at 3051. *See supra* text at 23. The Constitution and Title VII are thus congruent on this vital issue—discrimination on grounds of race is absolutely forbidden if the purpose is to achieve racial balance.

Here, D.C. Law 1-63, and the District's Affirmative Action Plan adopted in an effort to comply with that statute, clearly seek racial balance as a goal in and of itself. We conclude that the statutory goal of a racially balanced workforce is not only an inadequate ground upon which to support the AAP, but is a ground that stands condemned by Title VII and the higher law of the Constitution.

V

To summarize our holding, we conclude that the District has not demonstrated the requisite predicate of discrimination so as to justify use of a race-conscious hiring remedy;[37] that both the District of Columbia and the District Court failed to employ, and indeed even seriously to consider, non-race-based alternatives; and finally, that the District's admitted goal of achieving racial parity is constitutionally invalid. Accordingly, the challenged portion of the judgment of the District Court is

Reversed.

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[37] The Hammon plaintiffs strenuously assert that, given adequate opportunity, they can provide ample evidence of discriminatory conduct by the District. Our decision today in no wise prevents them from seeking such relief in the trial court. That question is simply not before us, and we thus have no occasion to address it.

ADDENDUM

Our dissenting colleague strenuously argues that "vestiges" of past discrimination remain in the Fire Department, and that the race-conscious hiring plan at issue represents a proper remedial vehicle for extirpating these remnants of yesteryear. To demonstrate these "vestiges," the dissent features what it considers the "striking" underrepresentation of black firefighters. Dissenting Op. at 5, 19. This tack does not withstand analysis, however, as the perceived disproportion is premised on an entirely artificial comparison of the number of black firefighters and the number of blacks in the *District*'s workforce. *Id.* It is undisputed that the Fire Department has consistently hired from the entire Washington metropolitan area; indeed, approximately half of the District's entry-level hires are from the suburbs. According to the 1980 Census, only 29.3 percent of the metropolitan area population (within the eligible age range) is black, which is *less* than the percentage of blacks in the Fire Department. The dissent's much vaunted disproportionality thus disappears when subjected to the most rudimentary analysis.[1]

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[1] The dissent charges that we failed to accord the District Court's "factual findings" the deference mandated by the "clearly erroneous" standard of review. Dissent Op. at 18. An analysis of the two "findings," however, reveals that the charge is without foundation. First, as we make clear in the text of our opinion, we in no wise dispute that the Fire Department was segregated in the early 1950's. The pertinence of this undisputed fact to the need *vel non* for a present-day race-conscious remedy is nowhere articulated, save for the incantation of "remaining vestiges" of this bygone era. But in that respect, the District Court's conclusory assertion that "there still exist some vestiges of the aforementioned past discrimination," *Hammon*, 606 F. Supp. at 1087, is based on a recitation of the current racial composition of the Fire Department, without more. *See supra* n. 32. The dissent's reliance on this latter "finding"—made without the benefit of an evidentiary hearing or any other fact-finding device and unsup-

The dissent also contends that the law favors voluntary remedial action. We agree. The dissent then goes on to suggest, however, that because the AAP was adopted by a political majority, its validity should be subject to less exacting review. Dissent Op. at 16, 20. The dissent's deferral to the will of the majority is odd in the extreme where, as here, the members of the benefited "minority" comprise the political majority. Even those members of the Court advocating "intermediate scrutiny" for race-conscious policies are of the view that "any statute must be stricken that stigmatizes any group or *that singles out those least well represented in the political process to bear the brunt of a benign program.*" *Bakke*, 438 U.S. at 361. *See also id.* at 357; *Fullilove*, 448 U.S. at 519. Only recently, Justice Marshall, joined in dissent by Justice Brennan, reiterated this basic principle in *Munro v. Socialist Workers Party*, 107 S. Ct. 533 (1986). The dissent's position, which entirely ignores the composition of the political majority, finds no support in law or reason under the circumstances presented here.

In our view, the dissent has, with all respect, failed to come to grips with the fundamental issue in this case: whether a public employer that not only is not characterized by closed channels of opportunity for minorities but to the contrary has been hiring a disproportionately large number of blacks at entry levels for a number of years, can employ a race-based hiring quota when non-race-conscious remedies are readily at hand. In our view, the principled resolution of this issue is clear—a race quota cannot stand under these circumstances. Our law requires no less than invalidation of a gerry-built scheme that easily could have been avoided had the parties been animated by the bedrock principle in our constitutional and legal edifice that human beings should, save for compel-

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ported by any analysis—highlights the weakness of the dissent's position.

ling reasons, be free of classifications fashioned on the immutable characteristic of race.[2]

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[2] Nothing in the Supreme Court's recent decision in *United States v. Paradise*, Slip Op. No. 85-999 (U.S. Feb. 25, 1987), alters our opinion in this case. In *Paradise*, the Court found a compelling state interest in the employer's "pervasive, systematic, and obstinate discriminatory conduct." *Id.* at 15. The Court then determined that the District Court's one-for-one promotion plan was narrowly tailored, concluding that "strong measures were required in light of the Department's long and shameful record of delay and resistance." *Id.* at 34.

1

MIKVA, *Circuit Judge, dissenting*: As of April 1, 1984, the Fire Department of the District of Columbia was 38 percent black. The officer corps of the Fire Department was 26 percent black. In a city where the working-age population at the time was about 70 percent black, this disproportion is curious. Black applicants from the city have outnumbered whites for as long as anyone can remember; in 1984, for example, blacks constituted 64.6 percent of the total number of applicants.

Plainly and simply, the Fire Department's curious makeup is the product of discrimination. The District of Columbia for years followed a policy of overt racial discrimination. These past discriminatory practices, reflecting the plantation politics practiced in the District for over a century, led to the current force in which three out of every five firefighters are white and three out of every four officers are white.

The majority cavalierly ignores this history of discrimination in the District's Fire Department. It urges us to forget the bad old days of discrimination and concentrate on the purity of current practices. Today, says the majority, the rules are fair. But the truth of the matter is that only as a result of the underlying discrimination suit in this case, and only for a brief period, has the Department been able to achieve any kind of racial parity among its new hires. Moreover, a racial parity in new hires does not wipe away the lingering effects of past discriminatory practices. The present personnel of the Fire Department were hired over a long period of years, and during many of those years the Department practiced intentional racial discrimination. No one suggests that all the old firefighters be fired, and they were not hired to be firefighters just for a year; thus, the effects of those earlier practices continue to distort the makeup of the current force. It is this conundrum that forced the District to adopt a temporary affirmative action hiring program (the "Plan"). And it is these

vestigial consequences that the majority of this court fails to address in its fact-laden but largely irrelevant opinion.

The question before the court is what steps can the District's political majority voluntarily take to remedy the consequences of past discrimination in its firefighting force. The majority seems to approach the problem with a "Catch 22" mindset. But determining whether the Plan is a permissible remedial measure requires the court to address critical questions largely overlooked by the majority. What is the District trying to do? What is the District's motivation? What adverse consequences will the District's action have? The answers to these questions lead me to conclude that the Fire Department's Plan is a reasonable remedial measure consistent with both Title VII and the Constitution. I do not agree that the people of the District must suffer through another generation of a fire force that reflects discrimination past and maintains racial disproportion stemming from that discriminatory history. I dissent from a court opinion that creates such a result.

I

A. *History of Discrimination in the Fire Department*

In 1864, the District's Fire Department shifted from a totally volunteer operation to a paid corps of firefighters. From 1870 to 1906, the Department was racially integrated and had seventeen black firefighters on salary. In 1919, the number was down to fourteen, none of whom was above the rank of private; these black firefighters were assigned to the Department's newly-established all-black company. Thereafter, the Fire Department maintained two forces—one staffed by black firefighters, one staffed by white firefighters. After 1921, the Department also maintained a dual promotion system, competitive but separate by color. Black officers were promoted off of a black promotion list to supervise all-black units.

The increase in the number of black firefighters after World War II led to the establishment of four additional all-black companies between 1945 and 1950. Three of the five all-black companies were staffed with white officers, two with black officers. No blacks, officer- or staff-level, were assigned to any white company.

Petitions were sent to both President Eisenhower and President Truman to request that they order the District Fire Department to discontinue its segregative practices. In 1951, the Fire Chief submitted a plan to the District Commissioners that called for the end of segregation in the Department. The union, the Fireman's Association, Local 36, strenuously objected to this plan and lobbied Congress against desegregation of the force. In 1953, the Commissioners issued the "Policy Order of the District of Columbia Regarding Non-Discrimination." The Policy called for an end to discriminatory employment practices. However, the Policy contained an exception covering assignment of the fire fighting division of the Fire Department. Over the protests of many, including Local 36 and several Congressmen, the Commissioners removed the exception to the Policy in 1954, thereby ordering the Fire Department to integrate.

Despite the official end of segregation in 1954, it was not until 1961 that the Department developed a timetable for the elimination of the all-black companies. In 1962, for the first time since before 1919, all firehouses had a "mixed" staffing pattern. Integration was based on a quota of a specific number of blacks assigned to each station.

Although blacks and whites were now together in the firehouses, the discriminatory practices continued. In each firehouse where blacks were assigned, there were designated "black beds." These beds were referred to, and often marked as, "C" beds, since only "Colored" firefighters slept in them. Where the firehouse was large

enough, the "C" beds were relegated to a separate bunkroom. There were "C" dishes and "C" eating utensils, for use by blacks only, and black firefighters were excluded from organized meals. Squad breathing equipment was similarly separated for use by one race only. During this period, black officers in the Department were given segregated job assignments and were subject to a rule allowing only one black officer per shift in a firehouse. These segregative practices continued until 1971.

The strains caused by the continuing discriminatory practices were reflected in the race relations of the firefighters' unions. In the late 1940's (during the segregated companies period), several black firefighters withdrew from Local 36 because of the union's aggressive opposition to integration. Local 36 thereafter barred blacks from membership, until 1960, when one black firefighter was accepted for full membership. The tension grew to a head with the 1968 racial riots in the city. In 1969, more than half of the city's black firefighters withdrew their membership from Local 36, charging that the union promoted racial discrimination within the department and was "hostile toward black firemen and the black community." That year, the Progressive Firefighters Association was formed so that "blacks could have a formal vehicle to advance their complaints." This need was perceived, in part, because Local 36 management was comprised of the same white officers against whom the black firefighters had complaints.

In 1972, through their new union, 150 black firefighters charged the Department with discrimination in its employment practices, including, *inter alia*, hiring. The D.C. Office of Human Rights ("OHR") found the Department guilty as charged. Following negotiations with OHR, the Department agreed to a plan intended to eliminate discrimination in the hiring, disciplining, and assigning of black firefighters. Despite this plan, in 1974,

the Fire Chief acknowledged a trend toward resegregation of the Department. This trend was evident even into the late 1970's in such practices as segregated seating arrangements at meals and assignment of only black firefighters to the most menial tasks.

Throughout its history, the Fire Department has slowly, but very slowly, increased its number of black firefighters. In 1947, 5 percent of the total uniform firefighting force was black; by 1949 the number had risen to 8 percent; eleven years later, in 1960, only 12 percent of the force was black. The underrepresentation of blacks is striking, even today. The chart below illustrates the disproportion as revealed when the number of black firefighters is compared to the number of blacks in the District's workforce during the same time period.

Year	Department (% Black)	Labor Force (% Black)
1962	13.0	52.0
1964	14.0	50.3
1969	19.2	60.7
1970	24.3	66.3
1972	24.8	64.0
1974	26.4	64.0
1976	25.5	64.0
1978	28.9	64.0
1980	30.0	64.7
1982	32.4	64.0

The underrepresentation of blacks historically has been even more severe in the supervisory ranks. In 1921, there were three black officers, all serving in the all-black company; twenty-four years later, in 1945, the number of black officers had risen to six. As late as 1978, when the Department was 28.9 percent black, the supervisory ranks were only 13.6 percent black. And with each step up the career ladder, blacks were represented at a lower level or in lesser numbers. These differentials in rank were, of course, reflected in salary differentials.

The record in this case graphically details this long history of substantial, chronic, and intentional discrimination against blacks in the District's Fire Department. This pervasive discrimination existed not only from 1919 to 1953, but into the 1970's. When deciding this case, the district court was, in its own words, "intimately familiar . . . with this whole record." Hearing Transcript, March 23, 1985, at 14. It was on this record that the district court found, as a matter of fact, that "for many years the District of Columbia Fire Department discriminated against blacks." *Hammon v. Barry*, 606 F. Supp. 1082, 1086 (D.D.C. 1985). None of the parties disputed this fact. *Id.*

B. *Importance to the Community of Correcting the Effects of Racial Discrimination*

Why does the District want to divorce itself from these past discriminatory practices and correct the current racial imbalance of the Fire Department personnel? In announcing the adoption of the Plan, Mayor Barry declared that the Plan would bring about "the kind of racial balance which will finally end years of racial dissension that for too long has taken place in [the Fire] Department." It is no secret that the Department for years has been plagued with tension, much of which stems from the memories of past discriminatory practices and the adverse effects those practices have produced. The effective operation of the fire force hinges on teamwork. Dissension in the ranks hampers the Department. Moreover, because the internal disputes have been fought out publicly, thereby fostering public awareness, public confidence in the Department's ability to do its job has eroded. The District would like to have a fire force that is not internally torn, that works together as a unit, that inspires confidence.

The District would also like to have a fire force that has credibility in the predominantly black population of

this city, as being fairly chosen, as no longer reflecting the bad old days of discrimination. Discrimination by government, or even the perception of discrimination, breeds mistrust, alienation, and hostility. Blacks resent, rightfully, being excluded from effective participation in their government. They view the current imbalance in the District's fire force as a product of past exclusionary policies. They may understandably transfer their resentment and hostility to the white firefighters, perceived as holding jobs stolen from blacks. In addition, they may question those white firefighters' feelings toward the black community. The effectiveness of firefighters in preventing and fighting fires and in providing emergency and rescue services depends heavily on public support and confidence. Without it, the Fire Department cannot adequately serve its vital function. Thus, a more racially balanced Fire Department—a Department purged of the vestiges of past discrimination—will be a more credible and a more effective Fire Department.

What is wrong with the District's concerns? Are they somehow not legitimate, not important? The majority seems to say that any race-consciousness in the hiring practices of the political majority designed to meet these concerns is improper. How can that be? That suggests that if the white political majority stole more than their share of firefighter jobs in the bad, not-so-old days, nothing can be done to remedy this past expropriation. That is not the law.

II

The Fire Department's Plan is subject to the strictures of the equal protection component of the Due Process Clause of the Fifth Amendment as well as the limitations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982). The majority's cut-and-paste treatment of the law is not very enlightening for purposes of either analysis. Nor is it accurately applied to this case. Supreme Court decisions dealing with

affirmative action in both statutory and constitutional contexts provide guidelines permitting use of racial classifications in limited circumstances. One such circumstance is predicated on the existence of discrimination against minorities. If the race-conscious measure is taken to remedy the discrimination, and not to punish or discriminate against nonminorities, then it is permissible. Pursuant to these guidelines, public employers may adopt reasonable race-conscious employment practices to remedy the effects of past discrimination.

A. *Use of Reasonable Affirmative Action Policies to Remedy Past Discrimination*

The Supreme Court has "consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination." *Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3052 (1986). As far back as the early school desegregation cases, the Court firmly established that equal protection guarantees do not prohibit district courts from ordering race-conscious remedies to eliminate the consequences of past racial discrimination. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court further held that the Constitution permits local school boards voluntarily to adopt desegregation plans that make express reference to race if necessary to remedy the effects of past discrimination. *McDaniel v. Barresi*, 402 U.S. 39 (1971).

In the ensuing years, the Court extended its approval to affirmative action outside the school desegregation context. In the pivotal case, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the majority of the Court held that the Constitution forbids governmental use of race-based classifications unless it serves a "compelling governmental interest." 438 U.S. at 299. Justice Powell made clear that one such compelling interest is "ameliorating, or eliminating where feasible, the

disabling effects of identified discrimination." *Id.* at 307. Four other members of the *Bakke* Court argued for application of less rigorous judicial scrutiny, but expressed the view that under either test, "a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact [that is] the product of past discrimination." *Id.* at 369 (Brennan, White, Marshall, Blackmun, JJ., concurring). The Court reiterated this notion two years later in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In *Fullilove*, the Court sustained against constitutional attack a statute setting aside a specific percentage of federal funds for minority contractors. The Court upheld the preferential measure because it was legitimately designed to ameliorate the present effects of past discrimination. 448 U.S. at 484.

Against this backdrop, the Court recently reviewed the constitutionality of employers' affirmative action in *Sheet Metal Workers*, *supra*, and *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986). Although the case did not involve a governmental employer, *Sheet Metal Workers* is instructive. In *Sheet Metal Workers*, the Court reviewed a court order finding a union guilty of engaging in a pattern and practice of discrimination against minorities in violation of Title VII and ordering the union to admit a certain percentage of nonwhites to union membership. The Court held that the race-conscious measure, deemed "necessary to remedy [the union's] racially discriminatory practices," did not contravene the equal protection component of the Due Process Clause. 106 S. Ct. at 3053.

Wygant, the other recent constitutional affirmative action case, unlike *Sheet Metal Workers*, did involve a public employer. Also unlike *Sheet Metal Workers*, *Wygant* involved a voluntary affirmative action plan. In *Wygant*, a local school board and the teachers' union entered into a collective bargaining agreement, a provision of which

would protect certain minority employees against layoffs. The Court, by plurality opinion, struck down the layoff provisions on equal protection grounds. In holding that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," 106 S. Ct. at 1848, the Court reinforced its view that race-conscious measures designed to eliminate the vestiges of past discrimination were consistent with the Constitution. What was missing in *Wygant* was any evidence of prior discrimination against minorities by the school board. *See id.* at 1847-49; *see also Sheet Metal Workers*, 106 S. Ct. at 3053 (distinguishing the case from *Wygant* on the basis of the presence of a "showing of prior discrimination").

The Supreme Court has reached the same conclusion under Title VII analysis: Title VII permits employers to adopt race-conscious affirmative action plans designed to eradicate the vestiges of racial discrimination. The seminal Title VII affirmative action case is *United Steelworkers v. Weber*, 443 U.S. 193 (1979). In *Weber*, a private employer and a union negotiated a collective bargaining agreement that reserved for black employees one half of all openings in a plant training program. The Court upheld the challenged plan under Title VII because it was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209.

The Supreme Court has never explicitly addressed the circumstances in which a *public* employer's voluntary affirmative action plan is permissible under Title VII. Recently, the Court held that Title VII's limitations on court-ordered relief do not apply to an affirmative action consent decree entered into by a governmental employer and a union representing minority employees. *Local No. 93 v. City of Cleveland (Vanguards)*, 106 S. Ct. 3063 (1986). However, the Court left unresolved the question of whether the plan could survive Title VII challenge by

nonminority employees. *Id.* at 3080. Nevertheless, the Court made clear that Title VII analysis of a governmental employer's voluntary affirmative action plan is controlled by the guidelines provided in *Weber, supra,* for analyzing private, voluntary plans. *See Vanguards,* 106 S. Ct. at 3073 n.8; *id.* at 3075 n.10 ("[T]here is . . . no indication that Congress intended to leave governmental employers with less latitude under Title VII than had been left to employers in the private sector . . . .").

The *Weber* Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," but articulated two main reasons for its finding that the plan at issue fell on the permissible side of the line. 443 U.S. at 208. First, the plan was "designed to break down old patterns of racial segregation and hierarchy." *Id.* Second, the plan did "not unnecessarily trammel the interests of the white employees." *Id.*

The differences between this statutory analysis and the constitutional analysis are unclear. *See* Maj. Op. at 17-18 & n.17. Under *Wygant,* a court reviewing the constitutionality of a voluntary governmental race-conscious remedial measure "must decide whether the [affirmative action plan] is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." *Wygant,* 106 S. Ct. at 1846-47; *see Vanguards,* 106 S. Ct. at 3073 n.8. As restated by Justice O'Connor, the *Wygant* constitutional inquiry is virtually identical to *Weber*'s Title VII test:

> [A] public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by the plan's racial preferences.

Wygant, 106 S. Ct. at 1853-54 (O'Connor, J., concurring); *see also Sheet Metal Workers*, 106 S. Ct. at 3053 (applying *Weber*-like analysis to equal protection claim). Essentially, both Title VII and the Due Process Clause permit governmental affirmative action plans that satisfy two criteria. First, the race-conscious action is designed to remedy past discrimination. Second, the remedy relates directly to the harm caused by the discrimination and does not overly burden nonminorities.

B. *Legal Guidelines for Analysis of Affirmative Action*

Several general concepts relevant to this case emerge from the developing affirmative action law. First, the law in general, and Title VII explicitly, favor voluntary compliance. Voluntary relief, therefore, may be more readily had than court-awarded relief. *See, e.g., Vanguards*, 106 S. Ct. at 3076-77; *see also Sheet Metal Workers*, 106 S. Ct. at 3035-37 (outlining instances when *courts* might utilize racial preferences to remedy violations of Title VII). Judicial intervention is a last resort; the predicates essential to a court order are not prerequisites of voluntary action. For example, the restrictions placed by Title VII on the court's ability to impose affirmative action plans after trial are not applicable to voluntarily adopted remedies for discrimination. *See Vanguards*, 106 S. Ct. at 3077; *see also Weber*, 443 U.S. at 211 (Blackmun, J., concurring) (approving voluntary affirmative action "whether or not a court . . . could order the same step as a remedy"). This same principle applies in the constitutional context.

Voluntary compliance is favored not simply because it does not involve a court; it is also favored because it is a decision made by a policymaking body, which a court is not. The decision of how to correct the effects of past discrimination without overly burdening nonminorities innocent of discrimination is fundamentally a policy decision, albeit one subject to legal standards. Understand-

ably, our system prefers policy decisions made by bodies charged with making policy. There is a presumption of legitimacy that derives from the decision-making process engaged in by an elected, representational body. When the decision is democratically made—voluntarily made—a sense of fairness and balance surrounds the compromise struck between the conflicting interests of the affected parties.

The preferred status of voluntary compliance is reflected in a court's perspective on review: voluntarily adopted affirmative action receives greater deference than court-ordered affirmative action. The issues involved when reviewing a government's voluntary decision to alter its practices are not the same as the issues involved when considering judicial power to restructure the operation of local governmental entities. *See Fullilove*, 448 U.S. at 483; *see also Vanguards*, 106 S. Ct. at 3077. Limits on the remedial authority of a federal court and concepts of judicial restraint are not implicated.

The distinction between voluntarily-adopted and court-ordered affirmative action is important to this case because the Fire Department's Plan is a voluntary plan. The district court did not impose the Plan over the city's objection. The Plan was adopted by a political majority, an elected city government vested by its citizens with full legislative, adjudicative, and administrative powers. The Plan, like the *Vanguards* plan, reflects the city's determination that the needs and interests of the citizens are best served by redressing the lingering effects of past discrimination against minorities. The Plan has been incorporated into a consent decree, but that does not distinguish the Plan, for purposes of this court's analysis, from other voluntary affirmative action. *See Vanguards*, 106 S. Ct. at 3072-77.

Of course, a political majority may not waive the rights of the minority. And an affirmative action plan is

not immune from challenge by the innocent parties obliged to share the burden of remedying past discrimination simply because the plan is adopted voluntarily, or democratically. *See Wygant*, 106 S. Ct. at 1850 n.8. But an affirmative action plan is not condemned simply because it requires nonminorities to share the burden. *Fullilove*, 448 U.S. at 484. Title VII and the Constitution require only that innocent parties' interests and rights not be overly or unnecessarily burdened. *See Wygant*, 106 S. Ct. at 1851; *Weber*, 443 U.S. at 208.

This precept surfaces another guideline embodied in affirmative action law. When assessing the effect of the chosen remedy upon innocent third parties, the Court has drawn distinctions between remedies that deprive nonminorities of rights they have previously enjoyed, or of legitimate expectations they have earned, and remedies that do not impose these direct burdens. The distinction is most visible in the different treatment accorded layoff provisions and hiring goals. Racially classified hiring goals designed to remedy the effects of past discrimination are more acceptable than layoff plans based on race imposed to reach the same legitimate result. *See, e.g., Wygant*, 106 S. Ct. at 1852; *Weber*, 443 U.S. at 208; *see also Firefighters v. Stotts*, 467 U.S. 561, 574-76 (1984).

The difference focuses on "the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities." *Sheet Metal Workers*, 106 S. Ct. at 3057 n.3 (Powell, J., concurring). As Justice Powell explained in *Wygant*, "[i]n cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job. . . . Layoffs

disrupt . . . settled expectations in a way that general hiring goals do not." 106 S. Ct. at 1851 (emphasis in original); *see also Stotts*, 467 U.S. at 570 n.4 (expressing same concern over loss of seniority rights as with layoffs). This intrusion and disruption is due, in part, to the fact that once an employee has a job, she relies psychologically and financially on the security and support that it affords her. Such investment is rarely impacted by hiring goals.

Stripping away a benefit differs from affording a benefit not only in effect, but also in fairness. Similarly, a hiring plan that selects unqualified blacks over qualified whites is more injurious than a hiring plan that simply prefers blacks in the selection from among equally qualified applicants. Although the direct effect on the white applicant is the same (non-selection), the sense of fairness is drastically different.

While not essential to this case, I pause to address one serious misapprehension on the majority's part. The majority engages in a lengthy exegesis of the law in order to reach the conclusion that a lawfully adopted race-conscious hiring program *must* be predicated on discrimination—that the only permissible use of affirmative action is to remedy discrimination. Maj. Op. at 19-27. The majority is mistaken in this fundamental premise of its opinion. In *Bakke*, the Supreme Court's first genuine affirmative action case, the Court held that "attainment of a diverse student body" is a compelling state interest justifying consideration of race. 438 U.S. at 311-35; *see Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring). Nothing the Court has said since *Bakke* necessarily forecloses the possibility that it will recognize additional governmental interests (other than remedying discrimination) as sufficiently compelling to justify use of affirmative action. Indeed, in *Wygant*, at least four Justices recognized other legitimate state interests which, in their view, sustain use of racial

classifications. Justices Marshall, Brennan and Blackman would hold that the "attainment of stability and educational quality in the public schools" justifies use of race-conscious employment practices to construct a racially diverse faculty. *Wygant*, 106 S. Ct. at 1863. (Marshall, J., dissenting). Justice Stevens similarly would hold that the state interest in a racially diverse teaching faculty is a "legitimate basis" for use of racial classifications. *Id.* at 1868 (Stevens, J., dissenting). In her concurring opinion, Justice O'Connor suggested that the Court might find other governmental interests relied upon by lower courts sufficiently compelling for adoption of affirmative action policies. *Id.* at 1853 (O'Connor, J., concurring). Justice Powell signalled his reception to one such possibility in *Bakke* by assuming that "in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification." *Bakke*, 438 U.S. at 310 (opinion of Powell, J.).

My disagreement with the majority on this important point of law is, fortunately, not critical to the resolution of this case. Regardless of the soundness of the majority's conclusion, what is uncontroversial is that a carefully constructed affirmative action program that *is* designed to remedy discrimination is consistent with both Title VII and the Constitution.

In sum, the distinctions that emerge from the cases in which the Supreme Court has dealt with this difficult and delicate balancing of competing concepts and ideals seem to be the following:

1. The Court will give political majorities greater latitude in finding suitable remedies to discrimination in the form of race-conscious employment policies than it will give to courts. Similarly, the voluntary adoption of race-conscious employment plans by public or private

employers will be given greater deference on review than will a plan created by a court edict.

2. The Court will allow a broader reach to race-conscious employment policies that deal with hiring than to those that involve promotions or discharge. Determinations as to how initially to divide up a pie have less of an adverse impact than do determinations that advance minority interests by taking away existing benefits from current employees.

3. Whether the analysis of race-conscious employment policies is performed under a statute, such as Title VII, or the Constitution, and whether it pertains to a public employer or a private employer, does not make a fundamental difference.

When this delicate fabric of the principles of affirmative action analysis is laid on the ingredients of this case, it is clear that the majority is ignoring or obscuring the directions given by the Supreme Court. I turn to these ingredients.

III

A. *The Remedial Nature of the Plan*

Title VII and the Constitution permit voluntary governmental affirmative action programs designed to remedy past discrimination. This fundamental premise undergirds the first *Weber* factor: a plan designed to break down old patterns of racial segregation and hierarchy is consistent with Title VII. *Weber*, 443 U.S. at 208. It also forms the basis for fulfillment of *Wygant*'s constitutional requirement: the government has a compelling interest in remedying its past discrimination. *Wygant*, 106 S. Ct. at 1847. In this regard, a "record of discrimination" is a "crucial condition precedent" to a finding that an affirmative action plan has a legitimate remedial purpose. *See* Maj. Op. at 19. A record of discrimination exists here.

The district court sustained the Plan based on two factual findings. First, the District's Fire Department overtly discriminated against blacks in the past. *Hammon*, 606 F. Supp. at 1086-87. Second, "there still exist some vestiges of the aforementioned past discrimination." *Id.* at 1087. Without even a nod in the direction of the established legal standard employed by appellate courts when reviewing such factual findings, and indeed without even discussing the relevant facts, the majority brushes aside the court's findings of discrimination. *See* Maj. Op. at 31-36. This cavalier treatment of a trial judge's functions is hardly the norm for appellate review.

The district court's findings of fact may be overturned on appeal only if clearly erroneous. Fed. F. Civ. P. 52(a); *see, e.g., United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Thompson v. Sawyer*, 678 F.2d 257, 274 (D.C. Cir. 1982). Evidence in this record amply supports the court's finding of past discrimination in the Fire Department. *See supra* pages 2-6. The statistical evidence of the current racial imbalance of the force as compared to the District's workforce adequately supports the court's finding that the effects of the Department's past discrimination remain. *See Weber*, 443 U.S. at 198-99 (using statistical underrepresentation of minorities as compared to labor force as evidence of remaining vestiges of discrimination); *see also Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring); *Hazelwood School District v. United States*, 433 U.S. 299, 308 & n.13 (1977).

Accordingly, I can neither fathom nor condone the majority's disregard of the district court's sound findings of discrimination in this case. Only by myopically viewing the facts and misconstruing the showing required can the majority conclude that "the predicate of discrimination has not been established in this case." *Id.* at 31. The majority's position is not only implausible, but incredible.

1. *Vestiges of Past Discrimination in the Fire Department*

There is a history of discrimination against blacks by the Fire Department, and that history has had severe and lasting effects on the firefighting force. The court suggests that the district court was wrong in looking back to the Department's discriminatory practices of the early 1950's. It then goes on to ignore or deny the interconnection between that well-documented evidence of past discrimination and the current statistical disparity in the racial composition of the force. *See* Maj. Op. at 16. But the court need not repair to the 1950's; the record is replete with evidence of intentional discrimination against blacks in the Fire Department through the sixties and early seventies. *See supra* pages 3-5. Moreover, it hardly needs saying that there is no "statute of limitations" on the pernicious effects of such discrimination. And in this case, past discrimination has had lasting effects.

We need only compare the current racial makeup of the Fire Department with the racial makeup of the work force to see that vestiges of discrimination remain. The disparity is equally striking when the makeup of the force is compared with the applicant pool. Although blacks comprise over 65 percent of the local labor force and between 65 and 75 percent of the recent applicants, they comprise only 38 percent of the Department's uniformed force.

If we start with the unquestioned premises that whites have no inherent superiority as firefighters and that formal education and acquired skills do not properly measure suitability for firefighting, there is no other possible explanation for the current imbalance other than that it is the result of the deliberate actions of whites and the discriminatory operations of testing and hiring procedures. To the extent that the majority intimates that using the metropolitan area as the relevant labor

market dissolves any "relics" of past discrimination, I disagree. *See* Maj. Op. at 33-35. The employer and the area served is the city, not the overwhelmingly white suburbs. The district court reasonably used the applicant pool as proof of the relevant labor market. *See Hazelwood*, 433 U.S. at 308 n.13. Those who apply constitute the pool from which employees are selected. The majority, despite its criticism, is notably unprepared to overturn this calculation method. The simple truth is that the "dismantlement" that the majority heralds, Maj. Op. at 36, *had not occurred* in the Fire Department prior to the adoption of the Plan.

2. *Sufficiency of the Fire Department's Predicate of Discrimination*

The majority apparently concludes that "vestiges" of past discrimination do not constitute a sufficient predicate for affirmative action—that there must be some kind of "smoking gun" evidence of present discrimination before a predicate can be found. The majority is, of course, wrong. The Supreme Court has stated time and again, in both Title VII and equal protection contexts, that affirmative action may be used to eradicate continuing effects (i.e., "vestiges") of discrimination that occurred in the past. *See, e.g., Wygant*, 106 S. Ct. at 1847; *Fullilove*, 448 U.S. at 484; *id.* at 496 (Powell, J., concurring); *Weber*, 443 U.S. at 197; *Bakke*, 438 U.S. at 307-308. Circuit courts have consistently applied this principle in sustaining plans designed to redress past discrimination's lingering effects. *See, e.g., Johnson v. Transportation Agency, Santa Clara County, California*, 770 F.2d 752, 758 (9th Cir. 1984) ("It is sufficient for the employer to show a conspicuous imbalance in its workforce" to justify a race-conscious remedy.), *cert. granted*, 106 S. Ct. 3331 (1986); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985) ("[A] prima facie case of employment discrimination through a statistical

demonstration of disproportionate racial impact" satisfies the remedial predicate.); *Van Aken v. Young*, 750 F.2d 43 (6th Cir. 1984) (holding that city may remedy imbalance in the composition of the Fire Department created by traditional segregative practices); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 562-63 (7th Cir. 1984) (holding that statistical disparity plus other indicia of past discrimination constitute sufficient remedial predicate).

The majority states that there must always be a threshold present-day Title VII violation, Maj. Op. at 36 n.33, or "ongoing racial discrimination," *id.* at 32, to allow affirmative action. This cannot be true. Under the majority's construction, the fruits of invidious discrimination could endure for decades. The very cases that the majority so laboriously reviews and quotes illustrate that race-conscious remedial practices need not rest upon *present* Title VII violations. *See* Maj. Op. at 19-27. The majority ignores its own recitation of the law.

Moreover, *present* unlawful discrimination has been found to exist in the Fire Department. We are faced with proven Title VII violations both recent and impending. The majority's assertion to the contrary glaringly exposes its skewed vision of the circumstances in which the Fire Department adopted the Plan. *See* Maj. Op. at 36 n.33. "Where test scores have disparate racial impact, an employer violates Title VII if he uses them in ways that lack significant relationship to job performance." OHR Hearing Examiner ("H.E.") Opinion ¶ 6(J); Defendant's Appendix ("D.A.") at 67 (citing Uniform Guidelines § 14(c)(9)); *see* EEOC Uniform Guidelines in Employee Selection Procedures, 29 C.F.R. § 1607.3 (1986). The OHR found that the 1980 entry level examination was not a valid predictor of job performance and that rank-order use of the test scores resulted in adverse impact on black applicants. *See* H.E. Opinion ¶¶ 6-7; D.A. at 66-68. Thus, the District in fact violated Ti-

tle VII with its April 1981 hiring from the Certificate of Eligibles. *See* Maj. Op. at 10-11.

Although the OHR-compelled exhaustion of the list of those who passed the 1980 test probably "brought the District back into compliance with Title VII" during the subsequent 1981-1984 hiring period, Maj. Op. at 36 n.33, the city faced renewed difficulties in 1984. Still wrestling with the vestiges of past discrimination, knowing the racial makeup of the force was still grossly disproportionate, unable to validate its entry-level exam, and in dire need of new firefighters, the Department administered the 1984 test. As the parties stipulated and the district court found, the 1984 test was "substantially the same" as the 1980 test (and was therefore similarly unrelated to job performance), and rank-order use of the 1984 exam would adversely impact black applicants. *Hammon*, 606 F. Supp. at 1088. If the 1984 exam had been used by the Fire Department in rank-order, therefore, its use would have violated Title VII. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The Hammon plaintiffs initiated their suit, in part, to prevent this unlawful use of the exam. The Fire Department's Plan is specifically designed to avoid this violation; its hiring selection procedures are designed "to eliminate the racial, sexual and ethnic disparity which would exist if the candidates were selected in rank order of the [1984] exam results." *Hammon*, 606 F. Supp. at 1088-89.

Ironically, the majority points to the District's employment practices between 1981 and 1984 and the racial complexion of the "new hires" as evidence of the city's "innocence." Maj. Op. at 31-33 & n.29. Yet the District's hiring procedures during this period were in compliance with an OHR order specifically aimed at preventing Title VII violations—violations that would have resulted from the further rank-order use of the nonvalidated,

nonjob-related 1980 entrance exam. *See* H.E. Opinion ¶¶ 1-3, D.A. at 69. To hail the Department's compliance with the order as evidence that there was no "pattern or practice of discrimination," Maj. Op. at 31, and then to strike down any basis for that order, is to turn appellate review into circular chaos.

Finally, the majority implies that only a "self-confessed discriminator" may remedy the effects of his prior discrimination. *See* Maj. Op. at 32. This proposition is clearly wrong as a matter of law. In *Weber*, the employer adamantly denied any involvement in discriminatory activity. Yet the Court approved the employer's affirmative action plan, which was designed, as is the Fire Department's, to "eliminate a manifest racial imbalance." 443 U.S. at 208. Further, the majority's implication is unsound as a matter of policy. As Justice O'Connor aptly noted,

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. . . . This result would clearly be at odds with this Court's and Congress' consistent emphasis on the "value of voluntary efforts to further the objectives of the law." . . . The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.

Wygant, 106 S. Ct. at 1855 (O'Connor, J., concurring) (citations omitted).

The record of discrimination in the D.C. Fire Department is unmistakeable and compelling. The Department's history is marked by egregious discrimination up through the not-so-distant past, and the remaining vestiges of that discrimination are dramatically evidenced in the current disproportionate racial makeup of the force.

There has been an administrative finding of recent Title VII violations in the administration and use of the 1980 test and a judicial finding of potential Title VII violation in the use of the 1984 test. This showing constitutes a sufficiently serious record of discrimination to serve as a predicate for employer-initiated, voluntary, race-conscious remedies. The Plan is designed to remedy this discrimination. The Plan thus serves the remedial purpose envisioned by *Weber* and *Wygant*; it clearly crosses the threshold under Title VII and the equal protection component of the Due Process Clause.

B. *Effect of the Plan on Nonminority Employees*

Although the Plan has a legitimate remedial purpose, such a plan cannot pass statutory and constitutional muster unless its hiring provisions are a permissible means of redressing the effects of past discrimination. Thus, my inquiry turns to whether the Plan works only minor harm to nonminorities and is narrowly tailored to achieve its remedial purpose.

The *Weber* Court listed three factors contributing to its determination that the affirmative action at issue did not "unnecessarily trammel the interests of the white employees." First, "the plan [did] not require the discharge of white workers and their replacement with new black hirees." Second, "the plan [did not] create an absolute bar to the advancement of white employees." Finally, "the plan [was] a temporary measure; it [was] not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber*, 443 U.S. at 208. The concerns expressed in *Weber*'s Title VII analysis are mirrored in the equal protection inquiry. In order to be sufficiently "narrowly tailored," an affirmative action plan must be crafted to cure the harm needed to be remedied, and the burden shouldered by nonminorities must be "relatively light." *Wygant*, 106 S. Ct. at 1851. With regard to the Title VII inquiry, the Fire Department's Plan infringes on the interests of white

employees less than did the *Weber* plan. Similarly, from the constitutional perspective, the Plan is sufficiently narrowly tailored to achieve its legitimate remedial purpose.

The Plan will have only marginal effects on the interests of nonminorities. It has no effect at all on existing white firefighters. As in *Weber*, and unlike in *Wygant*, no whites will be discharged or laid off under the Plan. The Plan establishes hiring goals affecting entry-level positions only. Furthermore, the Plan does not stand as an absolute hiring bar to white applicants. Whites will be hired in proportion to the number of white applicants who passed the 1984 test. The Plan does not require the hiring of unqualified blacks; therefore, a white applicant's opportunity for selection is not curtailed. Indeed, the Plan's hiring procedures cannot be said to intrude at all on nonminorities' expectation of employment. Thus, the burden imposed on whites is not simply "relatively light," *Wygant*, 106 S. Ct. at 1851, it is almost imperceptible. *See supra* pages 14-15.

Moreover, the Plan is a temporary, one-time, interim measure. Originally scheduled to end on October 1, 1986, it has been extended to April 1, 1987—a lifetime of merely two years. By contrast, both the *Weber* and *Sheet Metal Workers* plans, which the Court found sufficiently temporary, had no certain ending dates but rather were designed to continue until the employer's workforce (or union's membership) approximated the racial makeup of the local labor force. *See Sheet Metal Workers*, 106 S. Ct. at 3052; *Weber*, 443 U.S. at 208-09. The short-term hiring goals of the Plan are not designed and are not being used to maintain some specific racial balance in futuro; they are not a blueprint for the Department's future hiring selection procedures. The Plan contemplates utilization of validity studies, completed during the interim period, to review the Department's selection process in order to come into compliance with Title VII and alleviate the effects of past discrimination.

The Plan is properly tailored to accomplish its remedial objectives. It is a means of correcting the otherwise adverse impact on blacks of rank-order use of the unvalidated 1984 test. At the same time, by ensuring the addition of more blacks to the force, the Plan moves toward rectifying the racial imbalance created by past discrimination. Furthermore, the Plan is more modest in its goal and less burdensome on nonminorities than programs previously approved by the Court which adopt hiring goals directly related to the percentage of minorities in the workforce. The percentage of blacks hired under the Plan (60%) is less than the percentage of blacks in the workforce (70%). *Compare, e.g., Sheet Metal Workers*, 106 S. Ct. at 3053.

The court insists that not enough attention was given to other remedies that might have been employed. The majority converts the "narrowly tailored" inquiry into a burden on the District to demonstrate that it could find no less intrusive means of meeting its goal. *See* Maj. Op. at 38-39. It apparently bears repeating that when parties (such as the Byrne plaintiffs and the United States) challenge a voluntary affirmative action plan, the ultimate burden of persuading the court that the plan is not sufficiently narrowly tailored to achieve its remedial purpose remains upon the challengers. *See Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring). "Only by meeting this burden [can the challengers] establish a violation of . . . constitutional rights, and thereby defeat the presumption that the [employer's] asserted remedial action based on statistical evidence was justified." *Id.* The burden is not on the District in this case.

Nor is the burden shouldered by the reviewing court. It is telling that the only support the majority can muster for reprimanding the district court for its failure to search for reasonable alternatives to the Plan is *Sheet Metal Workers*, a case involving not voluntary affirmative action but a court-imposed plan. *See* Maj. Op. at

39-40. The majority's importation of strictures applicable to judicially imposed remedies is inappropriate. If the District had proposed the most intrusive means of remedying its past discrimination, and less intrusive means immediately came to mind, the court could be faulted for sustaining such a plan. *See, Wygant*, 106 S. Ct. at 1852. But when the policymaking body has adopted a reasonably fair, not overly intrusive, remedy, the court is not required to put on a political hat and look for some alternative remedy. The reasonable alternatives should be reviewed and considered by the policymakers, not by the court. It is exactly that policymaking initiative and prerogative that distinguishes the power of political majorities from that of courts. Courts ought not be second-guessing the political process.

The majority complains that the District did not consider *any* measures other than the Plan. Maj. Op. at 38-39. The only alternative suggested was a physical agility test. Before both the district court and this court, the District argued, with good reason, that it preferred the Plan. Even the Department of Justice admitted, in suggesting use of a physical exam, that such a test would tend to adversely affect the employment opportunities of women. In fact, the physical agility and strength test utilized by the New York City Fire Department was found to discriminate against women. *See Berkman v. City of New York*, 536 F. Supp. 177 (S.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983). The majority faults the District for not jumping from the frying pan into the fire. The district court was correct in noting "the absence of any clear options." *Hammon*, 606 F. Supp. at 1094. The majority certainly suggests no meaningful ones.

The District adopted the hiring provisions of the Plan for the interim period in which the Fire Department has an unvalidated entry-level exam that adversely impacts

on blacks, is attempting to develop an alternative test, but must nevertheless continue hiring. The Supreme Court suggested recently that "a district court may find it necessary to order interim hiring . . . goals pending the development of nondiscriminatory hiring . . . procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring . . . , or continued use of a discriminatory selection procedure." *Sheet Metal Workers*, 106 S. Ct. at 3037. If, in the circumstances facing the District, the district court might have been justified in ordering an interim affirmative action plan, it certainly was justified in approving the District's voluntary adoption of the Plan.

III. D.C. Law 1-63

I do not believe that the Affirmative Action in District Government Employment Act, D.C. Law 1-63, D.C. Code §§ 1-507–1-514 (1981), is before the court. We are neither asked nor required to consider its constitutionality. The statutory and constitutional permissibility of the Fire Department's Plan rests on the Plan's terms alone. It is the Plan's specific short-range hiring goals—hiring from the 1984 exam—that are before the court, and these goals were not dictated by Law 1-63. However, in suggesting that the District has some hidden, pernicious motivation in adopting the Plan, the majority takes a gratuitous swipe at the local law. Maj. Op. at 40-43. I am constrained to respond.

What is true of individual employer race-conscious employment practices is equally true when applied to statutes: a statute may permissibly require use of racial classifications to redress the effects of prior discrimination. *See Fullilove, supra.* Law 1-63 is such a statute. The law was neither conceived of nor passed in a vacuum, as one might believe by reading the majority's lambasting; the law responds to the past and current state of affairs in D.C. public employment. Discriminatory, seg-

regative practices pervaded D.C. government in the not-so-distant past. Vestiges of that discrimination infest present public employment, manifesting themselves in underrepresentation of minorities at all levels. Alarmed by the OHR's showing of disproportionately low numbers of blacks in D.C. agencies, then-Council Member Marion Barry introduced a bill to promote affirmative action efforts in the hiring of minorities. The legislative record shows that, after numerous public hearings, the Council concluded that nothing other than "blatant . . . discrimination" could explain the startling imbalances, and enacted the bill to "take decisive and substantive action to eliminate [this] discrimination."

The majority concludes that "discrimination on grounds of race is absolutely forbidden if the purpose is to achieve racial balance." Maj. Op. at 43. To the extent this blanket statement is intended to condemn all affirmative action plans that adopt a racial parity goal, it is incorrect. Adopting race-conscious employment practices that seek to achieve racial balance is a time-honored, court-approved, appropriate remedial response to discrimination. Affirmative action plans approved by courts have striven to achieve this very result. *See, e.g., Weber*, 443 U.S. at 197 (approving plan that reserves 50 percent of the positions for blacks "until the percentage of black[s] . . . in the plant is commensurate with the percentage of blacks in the local labor force"); *see also Sheet Metal Workers*, 106 S. Ct. at 3036 (describing instances when a court might order an employer "to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force"). The real question is whether the racial balance goal has a legitimate remedial purpose. Here it clearly does.

The law does not exhibit an administrative bent to discriminate against nonminorities, a characterization the Department of Justice propounded before this court. Nor does the statute "seek racial balance as a goal in and

of itself," as the majority contends, Maj. Op. at 43. There is a plausible remedial justification for the city's directive that such agency achieve affirmative action objectives and be acutely aware of its duty to assure equal employment opportunity. The Council wished to break down old patterns of racial segregation and hierarchy in District government. The statute sets forth the broad remedial policy goals which the Council adopted for that purpose. The Fire Department Plan reflects, in one small way, for one short period, this laudatory desire. That it seeks to achieve for the Fire Department what the D.C. statute seeks to achieve for all the employing units of the city can hardly be viewed as a compromise of the equal protection guarantees of the Constitution.

Conclusion

The current composition of the District of Columbia Fire Department is an obvious vestige of a long history of racially discriminatory practices. The majority opinion does not find room to describe or explain this overwhelming and indisputable fact. Instead, the opinion dwells at length on the fairness of the most recent hiring practices brought about by this very lawsuit and cavalierly denies the legitimate desire of the political majority of the District's citizens to eradicate the vestigial racial imbalance in current Fire Department personnel. Since the actual discriminatory practices occurred on someone else's watch, the court holds that not only is the court prohibited from remedying the current imbalance, but the majority of the District's citizenry, through its democratically directed institutions, is similarly precluded. The idealistic managers of the Fourteenth Amendment would be shocked to know that the very language of the Amendment that they passed through the 39th Congress, intended to *remedy* the evils of 100 years of slavery and discrimination against blacks, was being used to preserve the status quo of past Jim Crow practices.

There are limits beyond which even political majorities cannot go in attempting to remove the effects of past discrimination. Taking jobs away from whites and giving them to blacks would offend constitutional strictures, and the Supreme Court has said so. But the question of new employment is not so cabined. This court retrenches to older days and dubious doctrines to preclude the District from trying to fashion a Fire Department that does not reflect prior discriminatory practices and has the community credibility necessary to do its job.

In doing so, the court strikes more than a glancing blow at the District statute which was not squarely before the court and which has deeper purpose than the majority concedes. It may well be that when the Millenium arrives and all men have been good for some time, the District will have no need or justification for a law that seeks to remind personnel managers in the District of past discriminatory practices and their present effects. But that will not be for some time. For this time, I believe the court delivers a major setback to the cause of equality before the law.

I dissent.

ADDENDUM

The Supreme Court's most recent pronouncement on affirmative action, *United States v. Paradise*, Slip Op. No. 85-999 (U.S. Feb. 25, 1987), does not alter my position. In upholding the constitutionality of a court order compelling a public employer to promote one black for every white promoted, the *Paradise* Court reiterated its view that "remedy[ing] past discrimination and eliminat[ing] its lingering effects" is a compelling state interest justifying use of race-conscious employment practices. *Id.* at 19. In *Paradise*, as in the present case, the employer's past discriminatory practices resulted in a racial imbalance in the workforce. *Id.* at 18 n.20. The Court held that the temporary one-for-one promotion requirement, designed to serve as a stop-gap measure until the employer developed promotion procedures without adverse impact on blacks, was "narrowly tailored" to achieve its goal. *Id.* at 19-33. While *Paradise* is not on all-fours with the present case, the Court's reconfirmation that reasonable race-conscious measures designed to remedy the effects of past discrimination do not offend equal protection guarantees strengthens my conviction that the Fire Department's Plan should be sustained.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5669

MARVIN K. HAMMON, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

MARION S. BARRY, JR., MAYOR, D.C., et al.,

No. 85-5670

KEVIN MICHAEL BYRNE, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

THEODORE R. COLEMAN, D.C. FIRE CHIEF, et al.

No. 85-5671

MARVIN K. HAMMON, et al.
UNITED STATES OF AMERICA, APPELLANT

v.

MARION S. BARRY, JR., MAYOR, D.C., et al.,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(Civil Action Nos. 84-00903, 85-00782 and 85-00797)

On Petition for Rehearing

Argued May 22, 1987

Decided August 14, 1987

Charles L. Reischel, Deputy Corporation Counsel, DC, with whom *John H. Suda*, Acting Corporation Counsel, DC was on the petition for rehearing or rehearing *en banc* for appellee, District of Columbia.

Joan Burt was on the petition for rehearing or rehearing *en banc* for appellees, Hammon, et al.

William Bradford Reynolds, Assistant Attorney General, Department of Justice, with whom *Michael A. Carvin*, Deputy Assistant Attorney General, *David K. Flynn* and *Robert Delahunty*, Attorneys, Department of Justice were on the memorandum in opposition to petitions for rehearing or rehearing *en banc* for appellant, United States of America.

Before: MIKVA, STARR and SILBERMAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* STARR.

Concurring statement filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* MIKVA.

STARR, *Circuit Judge*: This petition for rehearing raises the issue whether the panel's opinion in *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987), has been undermined by the Supreme Court's recent decision in *Johnson v. Transportation Agency, Santa Clara County, Califor-*

nia, 107 S. Ct. 1442 (1987). After careful reflection, we conclude for the reasons that follow that *Johnson* does not alter the result in this case.

I

In *Hammon*, the panel, over dissent, struck down the hiring provisions of the District of Columbia's affirmative action plan (AAP) as violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* (1982 & Supp III 1985). We concluded that a predicate of discrimination must exist before race-conscious measures may lawfully be employed in a hiring plan. *Hammon*, 813 F.2d at 420-25. We further concluded that, once the threshold requirement of discrimination is met, the remedy must be tailored to fit the violation. *Id.* at 425-26. After analyzing the record in this case, which was before the District Court on stipulated facts and adjudicated by that court on summary judgment, we determined that the necessary predicate had not been established. *Id.* at 426-28. In addition, we held that even if the predicate existed, the hiring scheme created by the plan was not tailored to cure the "violation" because potential alternatives to the race-conscious regime were not considered. *Id.* at 428-30.

Shortly after our opinion issued, the Supreme Court rendered its decision in *Johnson*. In that case, the Court upheld in the face of an attack under Title VII a county transportation agency's promotion of a female over a marginally better qualified male to a skilled position (a road dispatcher in the agency's Roads Division) pursuant to a voluntarily promulgated affirmative action plan. The plan at issue in that case authorized the agency to consider the sex of a qualified applicant *as one factor* in making promotions to positions within a traditionally segregated job classification in which women had been significantly underrepresented.

Invoking *Johnson*, the District of Columbia now maintains that our "basic premise"—that discrimination is a predicate to remediation—has been "demolished" by the Supreme Court in one fell swoop. District's Petition at 1-2. We disagree. In our view, *Johnson* does not sweep so broadly as to eviscerate the carefully crafted body of existing law under Title VII.

Guided by its decision in *Steelworkers v. Weber*, 443 U.S. 193 (1979), the *Johnson* Court held that for an affirmative action plan to withstand scrutiny under Title VII, consideration of the race or sex of applicants must be "justified by the existence of a 'manifest imbalance' that reflect[s] underrepresentation of women [or minorities] in 'traditionally segregated job categories.'" *Johnson*, 107 S. Ct. at 1452 (quoting *Weber*, 443 U.S. at 197). The Court explained:

> The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefitting from the plan will not be unduly infringed.

Id.[1] *See also Ledoux v. District of Columbia*, Slip Op. No. 86-5377 (D.C. Cir. June 16, 1987).

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[1] In Justice O'Connor's view, as set forth in her concurring opinion in *Johnson*, affirmative action is permissible under *Weber* "only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination." *Id.* at 1461. Reiterating the Supreme Court's determination in *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1847 (1986), that societal discrimination alone is insufficient to justify a racial classification, Justice O'Connor reasoned that, in order to justify sex- or race-preferences, an employer must "point to evidence sufficient to establish a firm basis for believing that remedial action is required, [such as] a statistical imbalance sufficient for a Title VII

The Court was thus clear in relating the existence of employment discrimination (and goal of eliminating its effects) to the bedrock Congressional purposes informing Title VII. *Johnson* went on to provide guidance to lower courts in this sensitive and delicate area on the fact-specific task of determining whether the requisite "manifest imbalance" exists. In jobs that require no special expertise, the Court stated, "a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate." *Id.* (citations omitted). For jobs that require special training, on the other hand, "the comparison should be with those in the labor force who possess the relevant qualifications." *Id.* (citation omitted).

Applying those standards to the facts before it, the *Johnson* Court concluded that the "manifest imbalance" predicate was clearly shown in the job classification at issue. Specifically, in the job category in question, women were "egregiously underrepresented"; indeed, "*none* of the 238 positions was occupied by a woman." *Id.* at 1454 (emphasis in original).[2] As Justice O'Connor described it, "at the time the affirmative action plan was adopted, there were *no* women in the agency's skilled craft positions." *Id.* at 1465 (O'Connor, J. concurring) (emphasis in original). The inference of discrimination, as she

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prima facie case. . . ." *Id.* at 1462. Although the majority rejected Justice O'Connor's *prima facie* case standard, *id.* at 1452-53 & nn. 10-11, it did not quarrel with her conclusion that, although an employer need not admit or prove that it had acted discriminatorily, evidence of the effects of its past or current discrimination is a prerequisite to lawful race-conscious employment decisions.

[2] Women constituted 36.4 percent of the area labor market and, in 1970, approximately 5 percent of the local labor pool of skilled craft workers.

graphically detailed the situation before the Court, arose from the "inexorable zero." *Id.*[3]

II

A

Before we embark on our analysis of *Johnson*'s effects, we pause to address a preliminary issue. Late in this process—indeed following oral argument on the rehearing petition—we directed the parties to brief the issue, raised by the court *sua sponte*, whether the United States has standing to challenge the constitutionality of the AAP's hiring provisions. In its response, the United States contends that § 2000e-6 of Title VII, 42 U.S.C. § 2000e-6, which authorizes the Attorney General to bring an action whenever he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]," authorizes the Justice Department to raise ancillary constitutional claims under the Fifth and Fourteenth Amendments as well. In support of its position, the United States argues that it would be incongruous to permit the Attorney General to pursue statutory violations, but not constitutional violations, when the alleged offenses are based on the same set of facts and the statutory and constitutional jurisprudence in the area are closely interwoven.

In addition to this common-sense argument, the United States draws an analogy to a line of cases in which the Supreme Court has held that § 1971(c) of the Voting Rights Act, 42 U.S.C. § 1971(c) (1982) (authorizing

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[3] It should not go unnoticed that in its feverish reading of *Johnson*, the dissent glides over the "manifest imbalance" requirement without ever coming to grips with the fact that, in contrast to the "inexorable zero" in *Johnson* and the 1.83 percent representation in *Weber*, 37 percent of the District's firefighting force is black and an average of over 75 percent of new hires since 1981 have been black.

the Attorney General to bring an action whenever he has "reasonable cause to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section") empowers the Attorney General to bring suit to protect the voting rights of black citizens guaranteed by the statute (under subsection (a) or (b)) and by the Fourteenth and Fifteenth Amendments. *Louisiana v. United States*, 380 U.S. 145, 151 (1965); *United States v. Mississippi*, 380 U.S. 128, 136-38 (1965); *United States v. Alabama*, 362 U.S. 602 (1960).

The District of Columbia, on the other hand, argues that the United States lacks standing to enforce directly the rights secured to individuals by the Constitution. The District buttresses its argument with decisions of three circuits holding that, without explicit authorization by Congress, the United States may not bring suit on behalf of third parties to enjoin violations of the Constitution's substantive provisions. *See United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir. 1980), *reh'g denied*, 644 F.2d 207 (3d Cir. 1981); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977).

In light of (1) the manifest importance of this issue; (2) its novelty in this circuit; and (3) the venerable principle that courts should avoid " 'questions of a constitutional nature unless absolutely necessary to a decision of the case,' " *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (citation omitted), we decline, on reflection, to pass on the issue of the United States' standing. We are buoyed in that conclusion by the fact that the question has been raised so late in the litigation's cycle. As a result, we would be called upon either to wrestle with this troublesome issue without the benefit of full argument or to delay this litigation even further by setting the case down yet a third time for oral

argument. By virtue of this act of self-restraint, a posture that well becomes the least dangerous branch of our government, there should be no doubt whatever that our decision in this case is grounded solely on the law of Title VII. With this in mind, we return after this detour to the primary question raised in the petition for rehearing: whether *Johnson* has undermined the majority opinion in *Hammon*.

B

On its face, the present case stands in stark contrast to the situation in *Johnson*. Here, the District of Columbia Fire Department has been hiring blacks for entry-level positions at an average rate of almost 50 percent per year since 1969. By Title VII's hourglass, eighteen years is a long time. But the news of late is even cheerier from *Johnson*'s perspective. Since 1981, an average of over 75 percent of those hired each year as entering firefighters have been black.[4] Not surprisingly, the result of these hiring patterns is light years away from the situation that prevailed in *Johnson*. Indeed, as of April 1984, 37 percent of the District's firefighting force was black.

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[4] The dissent charges that it is "ridiculous" for us to look to the percentage of blacks hired since 1981 because in exhausting the list of applicants who passed the 1981 test as directed by the Office of Human Rights, "[t]he District was doing what the majority now forbids it from doing." Dissent at 9. The charge is unfounded. In our previous opinion, we explicitly noted that as an alternative to use of a race-based quota, "the District could have exhausted the 1984 eligibility list." *Hammon*, 813 F.2d at 430. In addition, the charge is irrelevant, because the legality of the District's hiring methods prior to the AAP is not before us; the challenge that we address is only to the quota-regime under the AAP. Finally, we do not, as the dissent implies, condemn the District's overall aim of avoiding discrimination against minorities. To the contrary, we only find impermissible the means—a rigid quota based strictly on race—that the District has chosen to achieve that aim.

The District Court nonetheless asserted, in conclusory fashion, that vestiges of discrimination remain in the Fire Department. In arriving at this determination, the trial court arguably made two "factual findings." First, the court "found" the undisputed fact that the Fire Department was officially segregated in the early 1950's. *Hammon v. Barry*, 606 F. Supp. 1082, 1086-87 (D.D.C. 1985). *See Hammon*, 813 F.2d at 428 n. 32. The relevance of that "finding" to a modern-day hiring remedy is not at all clear.[5] But even accepting *arguendo* the relevance of the point, it should go without saying that we fully accept that which is undisputed and thus consider it a "given" that officially sanctioned discrimination prevailed in the Fire Department in the 1950's. The rather obvious and substantial temporal gap between the time of the Korean Conflict (at the conclusion of Harry Truman's Presidency and General Eisenhower's ascension to power) and the present day, however, suggests that

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[5] The dissent's condemnation of what it perceives as "plantation" practices raises a fundamental conceptual issue (in addition to problems of appellate fact-finding, *see infra* text at 10 & note 9). Upon analysis, the "history" of segregative practices goes not to a hiring remedy at all, but to the entirely different (and thus far unlitigated) issue of whether vestiges of a prior, invidiously dual regime remain within the Fire Department. That is, the remedy for segregated institutions is to eliminate such invidious practices root and branch; thus the remedy for the pre-*Brown* educational regime in many States was not to admit black schoolchildren to school (for education was already being provided), but to cease and desist from making school assignments on racial lines. So too in the employment setting, the remedy for unlawful segregation practices is to obliterate those practices so that a "dual" Fire Department system will become a truly unitary system. Therefore, even if the dissent is right in its creative fact-finding, a hiring remedy is misplaced to the extent that the issue is one of segregative employment (as opposed to hiring) practices. The issue in hiring challenges is, instead, whether there is a manifest imbalance in a traditionally segregated *job category*.

something more recent should serve as a predicate for remedial action *right now*. However, notwithstanding the dissent's fervent assertion that insidious discriminatory practices at the Fire Department continued into the 1970's, *see* Dissent at 8, 10-11, the District Court made *no* findings to that effect. As the dissent takes pains to remind us time and again, fact-finding is the province of the trial court, and it is to that court that we explicitly allowed the parties to return for litigation of whether invidious discrimination infects the Fire Department. *Hammon*, 813 F.2d at 432 n.37; *see infra* note 9. And thus we are brought, more relevantly, to the District Court's determination that "there still exist some vestiges of the aforementioned past discrimination." *Hammon*, 606 F. Supp. at 1087.

This latter "finding" was based expressly, and solely, on the "current statistics" in the Fire Department. *Id.* The District Court simply recited the racial composition in the Fire Department, without any sort of analysis of the raw percentages or explanation of how those percentages demonstrate vestiges of the generation-old violation. One is put in mind of the old saw as to the veracity, or lack thereof, of statistics. Indeed, the District Court's rather mechanical incantation of statistics—*the bulk of which are relevant only to discrimination in promotions* (an issue not before us)—does not withstand the least rigorous sort of analysis.

Under *Johnson*'s teaching, the percentage of blacks in the District's Fire Department is to be compared with the percentage of blacks in the area labor force. There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the *Washington metropolitan area*, not just within the confines of the Nation's capital. The reason is that it is undisputed that approximately half of the District's entry-level firefighters have hailed from the suburbs. According to the 1980 Census, only 29.3 percent

of the statistically relevant metropolitan area population is black. In view of the fact that the Fire Department work force has a *greater* percentage of blacks than the black percentage in the area labor force, the District Court's conclusion that vestiges of discrimination remain in the Fire Department is plainly in error.[6] *See* Fed. R. Civ. Pro. 52(a); *cf. Turner v. Safley*, 55 U.S.L.W. 4719, 4723-24 n.* (U.S. June 1, 1987); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

Indeed, even if we employ the applicant pool as a surrogate for the area labor force, as the District Court did, the District Court's "finding" nonetheless remains entirely without foundation. As we elaborated previously, *see Hammon*, 813 F.2d at 427-28, the average percentage of black hires each year since 1981 (over 75.5 percent) is greater than the percentage of blacks in either of the two applicant pools referred to by the District Court (74.53 percent in 1980 and 64.6 percent in 1984).[7]

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[6] We cannot fail to note, in addition, that the District Court, in invoking the "vestiges of discrimination" talisman, failed entirely to address the question whether those "vestiges" amounted to the requisite "manifest imbalance." For this reason as well, we are constrained to conclude that legal error infected the District Court's analysis.

[7] The dissent nevertheless faults us for not employing the applicant flow data. The difficulty with the dissent's approach, however, is that it seeks to use recent applicant flow data to examine the overall composition of a department which has obviously been in existence (and engaged in hiring) for many years. The key analytically is to examine what hiring was done in the particular year(s) in question for which one is using applicant flow statistics. That is, there must be a nexus between applicant flow and the pertinent part of the hiring regime (or results thereof) under attack. *Cf. United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). *See generally* B. Schlei & P. Grossman, Employment Discrimination Law 1348-51 (2d ed. 1983). Obviously, if an applicant pool was historically 10 percent black, and the employer's workforce was approxi-

As a result, only if the percentage of blacks in the Fire Department is compared to the percentage in the District of Columbia's population—without regard to the fact that approximately half of the new firefighters are hired from the suburbs—is there even arguably an "imbalance." However, as there is no suggestion that the District acted in a discriminatory fashion by hiring from the entire metropolitan area, we decline to engage in an entirely artificial comparison between the percentage of blacks in the District's Fire Department and its population.[8] *See generally Hammon*, 813 F.2d at 426-28 & 432 n.1.

In sum, there is no manifest imbalance in the District's Fire Department; indeed, there is manifestly no imbalance at all. It could hardly be plainer that the Dis-

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mately 10 percent black, then a latter-day upsurge in the minority component of the applicant flow would not serve suddenly to condemn what had previously been racially neutral practices. There must be balance, logic and common sense in these sensitive cases, which requires fact-finding and analysis of whether the recent applicant flow is representative of that in past years or whether it is skewed (by recent recruiting campaigns, for example, targeted at minority applicants). *See id.*; *Hammon*, 813 F.2d at 427-28 n.31. Without the benefit of such fact-finding and analysis, we cannot accept a naked comparison of the percentage of blacks in the 1980 and 1984 applicant pools with the overall percentage of blacks in the entire Fire Department.

[8] Indeed, at last report, both traffic and commerce were moving freely between the District of Columbia and the thriving suburbs of Maryland and Virginia. To our knowledge, no Brandenburg Gate has yet been erected to prevent suburbanites from Silver Spring, Oxen Hill, or Alexandria from seeking employment in the D.C. Fire Department. And the much ballyhooed six-month residency requirement requires new hires to quit their former haunts and move into the District within six months *after* being hired. Until conditions change, we will not bury our heads in the sand, ostrich-like, by ignoring the metropolitan area whence the entry-level firefighters actually come.

trict's Fire Department is not burdened with the clogged channels of opportunity that characterized the employment situation in *Johnson* (and in *Weber*).[9]

C

There is more. The operation of Santa Clara's affirmative action plan differed in a critical respect from that of the District. In *Johnson*, the Court repeatedly stressed that the plan set aside no specific number of positions for minorities or women; instead, the Santa Clara plan authorized consideration of ethnicity or sex as *one* factor for evaluating qualified candidates. *Id.* at 1447 & 1454-1457. Indeed, the plan at issue in that case expressly stated that " '[t]he "goals" established for each Division should not be construed as "quotas" that must be met.' "

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[9] The same situation—clogged opportunities for admissions and government contracting—prevailed in the other two watershed cases, *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as more fully recounted in our earlier opinion. *Hammon*, 813 F.2d at 423-24. While not confessing that which could not be believed—that the Fire Department here in Washington is a bastion of clogged hiring opportunities, a garden of noxiously "inexorable zeros"—the District rehearses, at length, its contention that discrimination existed in its Fire Department. District's Petition at 6-13. In our opinion, we responded in detail to the District's arguments. *Hammon*, 813 F.2d at 426-28. We can discern no warrant for revisiting those points here.

In addition, counsel for the *Hammon* plaintiffs argues, as she did previously, that pervasive discrimination exists now in the Fire Department, and that the Office of Human Rights administrative proceedings (discussed in detail in our prior opinion) were infected with fraud and misrepresentations. Hammon Plaintiffs' Petition at 3, 11-15. The dissent suggests that discrimination is indeed the order of the day. That is not, however, for us to say at this juncture. Instead, we reiterate our previously stated conclusion that our holding expressly leaves the door open for this issue to be raised before the District Court. *Hammon*, 813 F.2d at 432 n.37.

Id. at 1455 (quoting Appendix 64). The Court thus likened Santa Clara's plan to the "Harvard Plan," noted with approbation by Justice Powell in *University of California Regents v. Bakke*, 438 U.S. 265, 316-319 (1978). As Justice Powell emphasized in *Bakke*, that plan allowed race to be deemed a "plus" in the college admissions process, but it emphatically did not insulate the individual from comparison with all other candidates. *Id.* Above all, the Harvard Plan did not embody a strict racial (or other) quota.

The District's plan, on the other hand, employs precisely that which neither Harvard nor Santa Clara County embraced—the tell-tale, single-factor, rigid quota. Under the District's approach, *each entering class of firefighters must be composed of at least 60 percent blacks.* Here, we have a hard-core, cold-on-the-docks quota, nothing less. This is certainly nothing remotely akin to either the Harvard Plan or the Santa Clara plan. Indeed, setting the passing score of its unvalidated entry-level test (administered in 1980 and 1984) at a very humble level, *see Hammon*, 813 F.2d at 429, and utilizing no other screening criteria (beyond a medical examination and background check), the District's hiring decisions are based almost entirely on a mandatory racial quota.[10] This regime stands in complete contrast to the plan at issue in *Johnson*, in which "supervisors were to consider a host of practical factors" in hiring decisions and where the hiring goal for women in the job category at issue was set at the modest level of approximately six percent for the plan's initial year. 107 S. Ct. at 1454.

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[10] At oral argument, counsel for the District of Columbia represented that the passing rate of a recent administration of the exam was much lower. This fact, obviously, was not before the District Court and, moreover, is irrelevant to the validity of the affirmative action plan under review, i.e., the plan approved by the District Court on the basis of the facts before it.

Indeed, the District's plan flies in the teeth of *Johnson*'s express *caveat* that "had the [agency's plan] simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question." *Id.* In the absence of additional screening considerations, the District's plan dictates "mere blind hiring by the numbers." [11] It thus bears no resemblance to the "moderate,

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[11] Contrary to the dissent's assertion, apparently drawn out of the ether, that the quotas in the District's AAP were designed merely to reflect the racial composition of applicants who passed the 1984 exam, *see* Dissent at 3-4, the parties' Statement of Stipulated Material Facts expressly states that "The AAP was intended to achieve compliance with D.C. Law § 1-63," which mandates that every agency of the District of Columbia government develop an affirmative action plan, with proportional representation of the available D.C. workforce (which is defined as persons in the District between the ages of 18 and 65) as its goal. Defendant's Appendix at 21. The District Court likewise observed that the AAP was created "in furtherance of the mandate of [D.C. Law § 1-63]." *Hammon*, 606 F. Supp. at 1087-88.

In our earlier opinion, we held that the goal of a racially balanced workforce was an inadequate ground upon which to support the AAP. *Hammon*, 813 F.2d at 430-31. The District now contends that *Johnson* validates the use of such a goal. In *Johnson*, the affirmative action plan's long-term goal was "to attain a work force whose composition reflected the proportion of minorities and women in the area labor force." 107 S. Ct. at 1447. It was critical, however, that the long-term goal acted only as a "benchmark for measuring progress in eliminating underrepresentation." *Id.* at 1453. The employer in that case had "no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards." *Id.* at 1457; *see also id.* at 1454. Indeed, Justice O'Connor in concurring characterized the goal as "merely a statement of aspiration wholly without operational significance." *Id.* at 1464.

In the District's plan, in contrast, D.C. Law 1-63's goal of proportional representation played a pivotal role in shaping the AAP. According to the 1980 Census, 64.1 percent of

flexible, case-by-case approach" embodied in the plan at issue in *Johnson*. *Id.* at 1424, 1457.

III

Quite apart from its very different facts, *Johnson* also squares with our analysis of the law of Title VII. Indeed, our earlier opinion was expressly informed by *Weber*, which broods omnipresently over the Court's decision in *Johnson*. *See Hammon*, 813 F.2d at 423-24; *Johnson*, 107 S. Ct. at 1449. *Johnson* fully shares with *Weber*, *Bakke*, and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), what we described in our earlier opinion as "the salient characteristic of *impaired access by certain (but by no means all) minorities to specific, identifiable educational, commercial, or job opportunities.*" *Hammon*, 813 F.2d at 423 (emphasis in original). *See also supra* note 9. In our view, this reality of impaired access (or predicate of discrimination) animated the Court's approval of the affirmative action drawn into question in those cases. The need to remedy discrimination figured prominently in *Johnson*, just as the "race-preference plan in *Weber* was 'remedial' in the broad sense of opening up to minorities theretofore closed channels of employment opportunities." *Id.* at 424-25. Indeed, the Court in *Johnson* emphasized that the Santa Clara plan "directed that sex or race be taken into account for the purpose of *remedying underrepresentation.*" 107 S. Ct. at 1453 (emphasis added).

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individuals between the ages of 18 and 65 residing in the District are black. The AAP required that each academy class consist of at least 60 percent blacks. That percentage, mirroring almost exactly the percentage of blacks in the "workforce" defined by D.C. Law 1-63 (which, of course, represented only a portion of the area labor force), compels the conclusion that the goal of D.C. Law 1-63 was not merely aspirational, but to the contrary served as a guide for actual hiring decisions. This the *Johnson* Court did not countenance.

Therefore, while it provides further definition to the "predicate of discrimination" requirement, *Johnson* does not, as the District would have it, drastically alter the legal landscape so as to eliminate this long-standing requirement. Far from it, *Johnson* says not a word to suggest that it was working such a radical revolution in the law of Title VII. As co-laborers in the non-political branch, with its ancient culture of stability and predictability, we are loathe to assume that the Supreme Court was suddenly turning its back on all that it had said and done for so many years and in so many different cases, some of which were written in the rather fresh ink of the prior Term. Courts are reluctant, wisely so, to discern in Congressional activity an implied repeal of statutes, and we are similarly well-advised not to discover *sub silentio* overrulings in the more cloistered environs of the Article III branch, especially in matters of such moment to the law and to the Nation. Our institutional reluctance to swallow the District's "here today, gone tomorrow" reading of *Johnson* is reinforced by the clarity with which the *Johnson* Court indicated that it was not sanctioning an "anything goes" approach to race-conscious action; a manifest imbalance in a traditionally segregated job category, we are told repeatedly by the Court, is the condition precedent to this sort of race-conscious action. In short, it is our view that our earlier holding—that a predicate of discrimination is required before an employer may lawfully employ a race-conscious remedial device—is fully in keeping with *Johnson*'s clear holding that a "manifest imbalance" in a "traditionally segregated job category" must exist before an employer may engage in preferential hiring (or promotions).

Finally, *Johnson* does nothing to disturb the long-standing requirement that the remedy crafted to cure a violation be tailored to fit the violation.[12] Just last Term,

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[12] The District argues that in *United States v. Paradise*, 107 S. Ct. 1053, 1070 n.28 (1987), the Supreme Court held

the Court in *Local 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3050 (1986), reaffirmed the truism that the "tailoring" requirement fully obtains in the Title VII context. The Court in that case expressly warned that a lower court "should also take care to tailor its orders to fit the nature of the violation it seeks to correct." *Id.*

To be sure, the *Johnson* Court articulated the tailoring requirement in different terms than those employed in *Sheet Metal Workers*, but it also made quite clear that an affirmative action plan must not "*unnecessarily* trammel[] the rights of male [or nonminority] employees." 107 S. Ct. at 1455 (emphasis added). The *Johnson* Court drew this requirement directly from *Weber*, in which the affirmative action plan's validity rested on the fact that it did not "unnecessarily trammel the interests of the white employees" or "create an absolute bar to the advancement of white employees," and was "not intended to maintain a racial balance," but instead was a temporary measure designed to "eliminate a manifest racial imbalance." 443 U.S. at 208. This, it seems to us, spells out the very "tailoring" requirement embodied in a plethora of Title VII law that we elaborated in our earlier opinion. *See Hammon*, 813 F.2d at 425-26. That long-standing requirement, in our view, remains firmly entrenched in the law of Title VII.

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that alternatives to race-conscious measures need not be considered as long as no equally efficacious remedies are apparent. We emphatically disagree. In that case, the plurality concluded that, in light of the employer's blatant history of manifest foot-dragging and egregious discrimination, it was doubtful that an effective alternative to the race-conscious order existed. *Id.* Nothing in *Paradise* suggests that the Court abruptly jettisoned the hallowed value of stability in the law and abolished the theretofore well-settled requirement that alternatives to race-based measures be considered and, if possible, employed.

We concluded previously that, because available race-neutral alternatives were not considered, the District's race-based hiring methods were not properly tailored to its remedial purposes. *Hammon*, 813 F.2d at 428-30. The District has come forward with no persuasive argument to the contrary. Its use of the AAP thus stands condemned under Title VII for this reason as well.

For the foregoing reasons, the petition for rehearing is

Denied.

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SILBERMAN, *Circuit Judge, concurring*: I concur in Judge Starr's statement but write separately because I admit I am uncertain as to the meaning of "manifest imbalance," the imprecise term used by the Supreme Court interpreting Title VII of the Civil Rights Act in *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987).[1] Certainly we should ordinarily avoid constitutional issues if we can resolve a case on statutory grounds, but our first obligation as judges, I suppose, is to be as confident as we can that we are correct in our reasoning, and I believe the constitutional limits on the use of racial preferences by government employers are—in the aftermath of *Johnson*—more easily applied than is Title VII. Moreover, the dissent correctly observes that our initial opinion treated the constitutional and statutory cases interchangeably, *see Hammon v. Barry*, 813 F.2d 412, 420 (D.C. Cir. 1987), and squarely relied on the Constitution to hold illegal the District's purpose (compliance with a D.C. proportional representation law) in adopting its affirmative action plan. *See id.* at 430-31. I think then, our proper course is to continue to rely, as I do, on both Title VII and the Constitution.

I.

First, however, I need confront the issue that we raised *sua sponte* at oral argument on petitioner's request for rehearing and to which supplemental briefs were directed: Does the United States have standing to challenge the constitutionality of the District of Columbia's affirmative action plan?[2] The Attorney General's

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[1] The term has its origins in *United States Steel Workers v. Weber*, 443 U.S. 193, 197 (1979), where the Court upheld a private employer's race-conscious affirmative action plan against a Title VII challenge because it was adopted in order to "eliminate manifest racial imbalances in traditionally segregated job categories." *Id.*

[2] There is no doubt that a cause of action exists to challenge the constitutionality of the plan. The question, however,

lawsuit alleged that the District of Columbia Fire Department's affirmative action plan (the "plan") violates both the substantive provisions of Title VII and, at the same time, violates the equal protection component of the due process clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). The government's theory —that the plan is designed to achieve an impermissible goal and excessively infringes upon the rights of innocent whites—arguably makes out both a Title VII violation and a constitutional violation. Indeed, when the Attorney General brought his suit, it might have been thought that Title VII and the Constitution imposed identical tests for evaluating the legality of race-conscious hiring plans; it was not until *Johnson* that this view was called into question.

As authority for this suit, the Attorney General relied on 42 U.S.C. § 2000e-6 (1982), a section of the Civil Rights Act of 1964 ("1964 Act") granting the Attorney General authority to bring "pattern or practice" discrimination suits. Section 2000e-6 provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII], and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, *the Attorney General may bring a civil action . . . requesting such relief . . . as he deems necessary to insure the full enjoyment of the rights herein described.*

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is whether the Attorney General may, in the name of the United States, assert the rights of those third parties who would have a cause of action against the District. Although the federal government's right to sue is not determined using normal standing analysis, it is convenient to frame the issue in terms of standing. *See* 13A C. WRIGHT, A. MILLER & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.11 at 18 (1984).

42 U.S.C. § 2000e-6(a) (1982) (emphasis added). The rights the Attorney General may "insure" by bringing suit include an individual's right to be free from discrimination by employers "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1982).

An early draft of the 1964 Act would have authorized the Attorney General to institute civil actions to redress the denial of *any* right, privilege, or immunity secured by the Constitution or laws of the United States. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 81 (1963); *see also id.* at 41 (additional views of Rep. Kastenmeier). But at a Judiciary Committee hearing in 1963, Attorney General Robert Kennedy testified against this broad grant of litigating authority:

> [The proposal] would extend to claimed violations of constitutional rights in State criminal proceedings or in book or movie censorship; disputes involving church-state relations; economic questions such as allegedly confiscatory ratemaking or the constitutional requirement of just compensation in land acquisition cases; the propriety of incarceration in a mental hospital; searches and seizures; and controversies involving freedom of worship, or speech, or of the press.
>
> Obviously, the proposal injects Federal executive authority into some areas which are not its legitimate concern . . . .

Id. at 82 (Minority Report). In an effort to narrow the Attorney General's litigating authority to those matters specifically addressed by the 1964 Act, this expansive proposal was dropped from the bill. The Attorney General was instead given a more limited authority; specific sections of the Act now permit him to bring suits to protect only those rights specifically guaranteed by the Act. One of these provisions, section 2000e-6, allows the Attor-

ney General to bring suit to protect those employment rights ensured by Title VII.

The question, then, is whether this authority permits the Attorney General to challenge a discrete employment practice of the District of Columbia on both Title VII and constitutional grounds. The answer turns on congressional intent—what kind of rights did Congress intend section 2000e-6 to protect? Between 1964 and 1972, the answer to this question was fairly clear. The 1964 version of Title VII "was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments." *United Steel Workers of America v. Weber*, 443 U.S. 193, 206 n.6 (1979). But when Congress passed the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 ("1972 Act"), it amended Title VII to protect, for the first time, employees of state and local governments. In so doing, Congress emphasized its intent to ensure to these employees their constitutional right to equal protection. The Senate, for its part, declared:

> The Constitution is imperative in its prohibition of discrimination by State and local governments. The Fourteenth Amendment guarantees equal treatment of all citizens by States and their political subdivisions . . . . It is clear that the guarantee of equal protection must also extend to such direct action as discriminatory employment practices.
>
> The Committee believes that it is an injustice to provide employees in the private sector with the assistance of an agency of the Federal Government in redressing their grievances while at the same time denying [similar assistance] to State and local government employees. The last sentence of the Fourteenth Amendment, enabling Congress to enforce the Amendment's guarantees by appropriate legislation is frequently overlooked, and the plain meaning of the Constitution allowed to lapse. *The inclusion of*

> *State and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the "appropriate legislation" to insure that all citizens are treated equally in this country.*

S. REP. No. 415, 92d Cong., 1st Sess. 10-11 (1971) (emphasis added). The House of Representatives expressed the same view in similar language:

> The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States.
>
> *Legislation to implement this aspect of the Fourteenth Amendment is long overdue,* and the committee believes that an appropriate remedy has been fashioned in the bill.

H.R. REP. No. 238, 92d Cong., 1st Sess. 19 (1971) (emphasis added). Whatever the purpose of Title VII in 1964, the legislative history of the 1972 Act makes plain that Congress intended Title VII as a vehicle to attack employment discrimination allegedly violating either Title VII alone or both Title VII and the Constitution. I think it follows that Congress intended the Attorney General to use his section 2000e-6 litigating authority to assert that the same governmental conduct arguably violating Title VII also violates the Constitution.

The Supreme Court had little difficulty recognizing the Attorney General's standing on three occasions in the early 1960s when he invoked statutory authority under the Civil Rights Act of 1957, 42 U.S.C. § 1971(a) (1982), to support a suit challenging a state's voting practices as violating both section 1971(a) and the Constitution. Section 1971(a), like section 2000e-2 of Title VII, is broadly written, providing that "[a]ll citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude." In

United States v. Mississippi, 380 U.S. 128 (1965), the Attorney General challenged as discriminatory that state's voting practices under both section 1971(a) and the Fourteenth and Fifteenth Amendments and Article I of the United States Constitution. He rested his authority to bring these claims on section 1971(c) of the 1957 Act, which provides:

> Whenever any person has engaged . . . in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute . . . in the name of the United States, a civil action . . . .

42 U.S.C. § 1971(c) (1982). Although, like section 2000e-6, this provision does not explicitly allow the Attorney General to employ a constitutional theory to challenge the practices forbidden by the statute, the Supreme Court held that section 1971(c) provides "express congressional authorization for the United States to file a suit precisely of this kind." 380 U.S. at 136; *accord Louisiana v. United States*, 380 U.S. 145, 151 (1965) (section 1971(c) allows the Attorney General to bring suit to protect the voting rights of blacks guaranteed by section 1971(a) and the Fourteenth and Fifteenth Amendments); *United States v. Alabama*, 362 U.S. 602, 604 (1960) (allowing suit under section 1971(c) for violation of section 1971(a) and Fifteenth Amendment).

The Supreme Court has recently warned us, to be sure, not to equate for all purposes the statutory prohibitions of Title VII with the constitutional prohibitions against racial discrimination. *See Johnson*, 107 S. Ct. at 1449-50 n.6. Indeed, the Court suggested, as I discuss below, that Title VII may permit certain affirmative action practices that the Constitution forbids. *Id.* But although the standards for determining if an employment practice violates Title VII of the Constitution seem now to differ, nothing the Court has said suggests that the Attorney

General's section 2000e-6 litigating authority may not be used to challenge an employment practice that arguably violates *both* standards.

Thus, although it is doubtful whether the Attorney General would have standing, absent statutory authority, to bring a naked constitutional action against the District of Columbia, *see United States v. City of Philadelphia*, 644 F.2d 187, 199-201 (3d Cir. 1980), *reh'g denied*, 644 F.2d 206 (3d Cir. 1981); *United States v. Solomon*, 563 F.2d 1121, 1126-29 (4th Cir. 1977),[3] I think it clear the Attorney General's authority under section 2000e-6 to bring Title VII "pattern or practice" claims permits him to argue in the same suit that the District of Columbia's hiring practices also violate related constitutional provisions.

II.

The constitutional issue—presented, in my view, quite starkly in this case—is whether the District of Columbia may insist on proportional representation of blacks in government employment without violating the equal protection component of the Fifth Amendment's due process clause.[4] The answer, if drawn from recent Supreme Court constitutional decisions, seems clearly "no." Race-conscious employment policies on the part of government are permissible to remedy discrimination, *see United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987) (Bren-

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[3] *But see In re Debs*, 158 U.S. 564, 584-86 (1895); *Brown v. Califano*, 627 F.2d 1221, 1232 n.67 (D.C. Cir. 1980); *United States v. City of Jackson*, 318 F.2d 1, 11-16 (5th Cir. 1963).

[4] Judge Mikva objects to characterizing the District's affirmative action plan as seeking racial balance or proportional representation on grounds that the fire department seeks only 60% black hiring, and not 70%. *See* slip op. at 3 (Mikva, J., dissenting). I think the difference in this regard is insignificant. Suppose, for instance, the District's black quota was instead 65%, 68%, or 72%.

nan, J.); *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842, 1847 (1986) (Powell, J.), or, at least, the existing direct effects of past discrimination. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 477-78 (1980). But Judge Starr's opinion seems to me to demolish the notion that black firefighters in the District have faced discrimination for any period of time relevant to a present remedial policy. *See* slip op. at 8-10. Indeed, if anything, it might be said that it is white firefighters, rather than black, who have faced recent racial discrimination. *See Bishopp v. District of Columbia*, 788 F.2d 781, 786-89 (D.C. Cir. 1986); *Dougherty v. Barry*, Nos. 82-1687, 83-0314 (D.D.C. April 30, 1983);[5] *cf. Dougherty v. Barry*, 604 F. Supp. 1424, 1428-30 (D.D.C. 1985). In truth, the only evidence the District advances to support its claim that the District discriminates against blacks is a test which, if used as an applicant ranking device, apparently has a disparate negative impact on blacks. Putting aside the point that the very test in question passed constitutional scrutiny in the Supreme Court, *see Washington v. Davis*, 426 U.S. 229, 245-46 (1976),[6] the District does not so use its test. Rather, its only purpose today apparently is to provide the District with a legal justification for hiring in accordance with a quota. The Fire Department administers the exam, but since it believes that rank order hiring based on the exam's results would be discriminatory, it does not do so.[7] Instead it hires pursuant to a quota to "remedy" the discriminatory ef-

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[5] I express no opinion on the merits of this case, now on appeal before this court.

[6] The District claims that its written objective test may have been legitimate for police officers but not for firefighters because the former have greater need to communicate, and the test measures verbal skills. Although there is little evidence in the record on this point, anyone who has watched firefighters in action might view the District's argument skeptically.

[7] At least since 1980. *See Hammon*, 813 F.2d at 417.

fect of that which, as best I can determine, it does not do. This seems to me quite artificial, if not Orwellian.

Nor can the District's affirmative action plan be constitutionally defended as seeking racial diversity among firefighters for its own sake. Although the Court has recognized a legitimate, compelling governmental concern in state universities' seeking racial diversity in their student bodies for educational purposes, *see Regents of the University of California v. Bakke*, 438 U.S. 265, 311-15 (1978) (Powell, J.), it has never extended this approach beyond the academic setting. Pursuing racial balance or proportional representation simpliciter is not a permissible goal of racial classifications under the equal protection clause. See *Wygant*, 106 S. Ct. at 1847-48 (Powell, J.); *Bakke*, 438 U.S. at 307 (Powell, J.).

The question remaining, as I perceive it, is whether the Supreme Court's reasoning in *Johnson* undermines its previous interpretations of the equal protection clause. How, it might be asked, does one square the *Johnson* Court's approval of a government affirmative action plan and corollary employment practices designed to alter a "manifest imbalance" of women in certain job categories with the Court's prior constitutional precedent authorizing racial or sexual preferences only to remedy discrimination? Does the Supreme Court's opinion, although ostensibly limited to an interpretation of Title VII, necessarily suggest a change in the Court's interpretation of the equal protection clause? To be sure, as Judge Starr's opinion rightly notes, there is a world of practical difference between the very low number of women in the relevant jobs in *Johnson* and, for example, the number of blacks in the D.C. Fire Department. But unless one accepts Justice O'Connor's reasoning—which the Court did not—that the small number of women in the particular job categories in Santa Clara County was itself evidence of employer discrimination, *see Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judg-

ment), there is an undeniable tension between *Johnson*'s rationale and prior constitutional analysis. That is so because it is difficult to reconcile the Court's prior prohibition in *Wygant* against government employers' seeking racial *balance*, with the Court's approval in *Weber* and *Johnson* of governmental efforts to alter a manifest racial (or gender) *imbalance*. Judge Mikva, whose opinion, perforce, determines that the District's plan passes both statutory and constitutional muster, apparently sees no tension between the two lines of cases.[8] He seems to conclude that having thirty-seven percent blacks in the Fire Department as compared to seventy percent in the D.C. workforce "clearly" constitutes a manifest imbalance. But since he does not suggest at what level a "manifest imbalance" becomes merely an "imbalance," he does not appear to give any quantitative meaning to the word "manifest."[9] So I take Judge Mikva to believe that, in effect, the Supreme Court's *Johnson* opinion did

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[8] Although Judge Mikva does not explicitly discuss the constitutional claim, he does not conclude the government lacks standing to raise that issue, and he must therefore believe that the District's plan conforms to both Title VII and the Constitution.

[9] In his initial dissent, Judge Mikva argued that the "38%" (actually 37%) black representation in the Fire Department as compared with the 70% black composition of the District's workforce, demonstrated discrimination. *See Hammon*, 813 F.2d at 441-42 (Mikva, J., dissenting); *see also id.* at 435. In his dissent to the denial of rehearing, however, Judge Mikva switches his statistics, claiming now that the 37% of blacks in the Fire Department, as compared to the 64.6% in the 1984 applicant pool, constitutes "manifest imbalance." *See* slip op. at 10. How this latter comparison shows "imbalance," I must confess, is beyond me, since in the same year 78.6% of the new hires were black—a hiring rate that exceeds the composition of blacks in the applicant pool. *See Hammon*, 813 F.2d at 418. In fact, Judge Mikva is mixing up what economists would describe as the "stock" and "flow" numbers.

exactly that which the Court denied doing—overruled its prior constitutional ban on racial balancing for its own sake.

I think it did not. That the Court in *Johnson* so carefully limited its opinion to an interpretation of Title VII, *see Johnson*, 107 S. Ct. at 1446 n.2, suggests to me that the majority was unwilling to disturb its recently expressed equal protection limitations on racial or gender preferences for government employment—in particular its disapproval of proportional representation as a governmental goal. Justice Stevens quite clearly would proceed separately from the rest of the Court. By quoting at length in his concurring opinion from an article that justifies seeking racial diversity in employment based on a broad range of grounds, Justice Stevens seems to have abandoned constitutional objections to racial proportional representation. *See Johnson*, 107 S. Ct. at 1460 (Stevens, J., concurring). The majority of the Court, however—indeed by vivid contrast with Justice Stevens' opinion—has not accepted that position. Although I readily concede that interpreting Title VII to permit personnel practices that the Constitution prohibits seems anomalous, the Court has nevertheless concluded that Congress intended just that state of affairs. *See Johnson*, 107 S. Ct. at 1449-50 n.6.

It is certainly true that granting hiring preferences to blacks or other minorities as a technique to foster employment integration—as opposed to merely remedying discrimination—has been employed by policymakers in federal and state governments in recent decades. The Court's *Johnson* opinion determines only that Congress, when it extended Title VII to public employers in 1972, did not mean to preclude totally this practice for government any more than it meant to do so in 1964 with respect to private employers. *See Weber*, 443 U.S. at 202-08. "Manifest imbalance," as used by the Supreme Court, is thus a synonym for segregation—whether intentionally maintained or not. So viewed, it is possible

to categorize the female employees in the *Johnson* case as found in segregated jobs. The Court emphasized that women working for the Santa Clara County Transportation Agency were concentrated largely in EEOC job categories traditionally held by women. *See Johnson*, 107 S. Ct. at 1446. I therefore interpret *Johnson* and *Weber* as holding that Title VII permits temporary race-conscious employment practices by public or private employers to combat job segregation—and in that respect it seems incongruous to me to describe the District's Fire Department as segregated. But, in any event, it is one thing to interpret Title VII broadly to permit private and public employers' efforts to integrate their workforce or job classifications. It is another thing entirely to read the Constitution's equal protection provisions in such a fashion. Congress can, of course, control by further legislation how much and for how long racial preferences will be permitted, but the Constitution's equal protection clauses are not so flexible. The federal judiciary cannot, as if we were policymakers in the executive branch, interpret the Constitution so as to calibrate the granting of racial preferences until we conclude that a desirable degree of employment integration has been achieved. The Constitution is not an executive order.

The dissent seems to assume that the Constitution (as well as Title VII) permits local, state, and federal governments to provide employment preferences to blacks, and perhaps other minorities, until proportional representation is reached—presumably in all job categories. That cannot be so. It is manifestly inappropriate for us to take judicial notice of the unlikely proposition that all ethnic or racial groups in our society have the same relative interests in or capability for performing the various jobs in our economy. *Cf. Local 28, Sheet Metal Workers, Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3060 (1986) (O'Connor, J., concurring in part and dissenting in part). *But see Hammon*, 813 F.2d at 442 (Mikva, J.,

dissenting).[10] Furthermore, the dissent's position would make the legality—and even the constitutionality—of the District's plan turn on whether it was designed to *obtain* or *maintain* racial balance. That distinction, it seems to me, cannot hold. It is bizarre to suggest that the District legitimately could provide preferences for blacks until the Fire Department mirrors exactly, or to some arbitrary point short of exactly, the proportion of blacks in whatever is the relevant population; but thereafter no preference would be permitted even if the preference were necessary to maintain that proportion. In any case, the District's objectives are not so transitory; the city ordinance pursuant to which the affirmative action plan is adopted, although phrased in terms of a "goal," appears to call for permanent proportional representation. *See* D.C. Law 1-63, D.C. CODE §§ 1-507 to -514 (1981).

The dissent further argues strenuously that, if on no other grounds, the many years of the District's (as well as the country's) application of a "separate but equal" discriminatory policy justifies the District's affirmative action plan. *See* slip op. at 10-11 (Mikva, J., dissenting); *Hammon*, 813 F.2d at 435-36, 446-47 (Mikva, J., dissenting). That sounds like a general theory of reparations. As Justice Powell has cautioned, however, racial preferences for blacks cannot constitutionally be predicated on the general societal discrimination that blacks suffered for much of the nation's history. *See, e.g.*, *Wygant*, 106 S. Ct. at 1847-48; *Bakke*, 438 U.S. at 307. If they were to be, that rationale would lead ineluctably to approval of proportional representation. Ironically,

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[10] Judge Mikva's assumption, that any disparity in the percentage of blacks in the Fire Department is necessarily attributable either to discrimination or to black inferiority, is not only simplistic—it is wrong. *See* T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 37-60 (1984); T. SOWELL, THE ECONOMICS AND POLITICS OF RACE 186-99 (1983); T. SOWELL, RACE AND ECONOMICS 150-56 (1975). *See generally* T. SOWELL, ETHNIC AMERICA (1981).

the District's policy can itself be described as embracing the notion of separate but equal—separate treatment of different races to achieve equal (proportionate) results. In the infamous case of *Plessy v. Ferguson*, 163 U.S. 537 (1896), Justice Harlan exposed the majority's claim that separate but equal was not a "badge of inferiority," *see* 163 U.S. at 551, by asserting that the separate accommodation laws at issue in that case were predicated on a governmentally sanctioned belief in white superiority. *Id.* at 560 (Harlan, J., dissenting). The District, of course, wishes to help its black citizens—not to degrade them with a badge of inferiority. But does not its hiring plan—which does not really attack discrimination or barriers to equal opportunity—suggest the very evil that infected the *Plessy* doctrine? And might it ultimately be even more harmful as an affront to black self-esteem because it was done with their interests paramount? [11]

I think this case has very little, if anything, to do with remedies for past discrimination—whether general or proximate, recent or long ago. Instead, it has a great deal to do with old-fashioned American politics, which has always had a strong ethnic flavor. As is well known, government employment in American cities was, for many years, parceled out to various ethnic groups in accordance with their political clout. Blacks, as the political majority in the District, are understandably claiming that which their predecessor groups in American cities once enjoyed. However, those very constitutional protections that may frustrate the political majority in the District also serve to protect nationwide minorities.

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[11] In this regard, Justice Scalia might well be incorrect in assuming that only white males bear the costs of affirmative action preferences. *See Johnson*, 107 S. Ct. at 1476 (Scalia, J., dissenting).

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MIKVA, *Circuit Judge, dissenting*: I would grant the petition for rehearing; the original decision of the majority was wrong, and the majority's instant defense of it is more so. The Supreme Court's recent decision in *Johnson v. Transportation Agency, Santa Clara County, California,* 107 S. Ct. 1442 (1987), has ravaged the majority's original opinion beyond repair.

The *Johnson* Court's endorsement of the voluntary affirmative action plan of a public employer vindicates my earlier conviction that the District of Columbia's affirmative action hiring plan for its Fire Department (the Plan) does not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* (1982 & Supp. III 1985). Building upon the analytical framework introduced in *United Steelworkers v. Weber,* 443 U.S. 193 (1970), the *Johnson* Court established a two-part inquiry which a court must make in determining whether a challenger has sustained his burden in proving that a voluntarily adopted affirmative action plan violates Title VII. *See Ledoux v. District of Columbia,* Nos. 86-5377, 86-5378, slip op. at 20 (D.C. Cir. June 16, 1987). As I indicated in my original dissent in this case, the United States did not even begin to demonstrate the Plan's illegality under this test. *See Hammon v. Barry,* 813 F.2d 412, 433-47 (D.C. Cir. 1987). I write here, therefore, not to elaborate on my reasons for concluding that the Plan withstands Title VII (as well as constitutional) scrutiny. I write instead to spotlight the disturbing gerrymandering of the facts and distortion of the law in which the majority engages in order to appear to survive *Johnson*'s devastating blow. I pause first, however, to underline the substantial retrenching the majority has done since the panel opinion.

A. *Constitutional Aspects of the Original Majority Opinion*

Rattled by the realization of the United States' dubious authority to pursue its constitutional challenge to

the Plan, and wisely hesitant to enter that legal thicket, the majority recants any notion that its prior opinion was constitutionally-based. *See* Majority Opinion (Maj. Op.) at 8. This forswearing should not go unnoted. In employing constitutional principles to inform its prior Title VII analysis, the majority strongly suggested that the Plan violates the equal protection component of the Due Process Clause. In fact, the United States has argued that there is no need to rehear this case because whether or not the Plan can survive Title VII scrutiny after *Johnson*, it is still invalid for the constitutional reasons which this court delineated in its original opinion. Regardless of whether the majority meant to do so earlier, the court is now explicitly *not* holding the Plan unconstitutional.

It must be remembered that the majority did not confine its prior decision to the Plan before the court; the majority also heaped aspersions on the Affirmative Action in District Government Employment Act (D.C. Law 1-63), finally concluding that the law's admitted goal of attaining a racially balanced workforce is "constitutionally invalid." *Hammon*, 813 F.2d at 431. While the majority clearly still stands ready to use the law's aspirations to impugn (unfairly) the District's motives in adopting the Plan, *see* Maj. Op. at 15 n.11, we must assume that the court has now retracted its earlier conclusion that D.C. Law 1-63 is constitutionally unsound.

Of course, once the constitutional underpinnings are removed and *Johnson* confutes the Title VII analysis, the question remains whether there is anything left to salvage of the majority's original reasoning. In my view, the majority has inherited the wind.

B. *Title VII Analysis Under Johnson*

In its earlier decision, the majority also concluded that the statutory goal of a racially balanced workforce, as a ground upon which to support an affirmative action plan,

"stands condemned by Title VII." *Hammon*, 813 F.2d at 431. The majority's pronouncement itself stands condemned by *Johnson*. The affirmative action plan upheld by the Court in *Johnson* was based explicitly on "the long-term goal of a workforce that mirrored in its major job classifications the percentage of women in the area labor market." *Johnson*, 107 S. Ct. at 1453-54. The Court endorsed the public employer's use of this aspiration as a "benchmark for measuring progress in eliminating underrepresentation" in its workforce. *Id.* at 1453. Thus, long-term goals of attaining racial parity with the "area labor market or general population," *id.* at 1452, such as is expressed in D.C. Law 1-63, serve as valid support for affirmative action plans.

The majority's insupportable assertion that D.C. Law 1-63 was "not merely aspirational, but to the contrary served as a guide for actual hiring decisions," Maj. Op. at 16 n.11, highlights the majority's continued misrepresentation of the Plan. The majority steadfastly maintains the misconceived notion that the District designed the Plan's racial "quota" to reflect the racial composition of the District's workforce. The statistics themselves refute this contention: the percentage utilized by the Plan (60% black) does *not* "mirror[] almost exactly the percentage of blacks in the 'workforce' defined by D.C. Law 1-63." *Id.* The Plan governs the Fire Department's hiring in 1984 and subsequent years (until the list of eligible applicants from the administration of the 1984 test is exhausted). The percentage of blacks in the D.C. workforce in 1984 was 70%. (The majority inexplicably looks to the *1980* Census figures.) Had the District wanted to establish racial parity with the District's workforce, it would have used this 70% figure in the Plan. The Plan's actual figure—60%—does not imitate the percentage of blacks in the D.C. workforce; it matches the percentage of blacks who passed the 1984 entry level exam. The Plan does not blindly direct the Fire Department to hire

six blacks for every four nonminorities hired from now until perpetuity, as one might understand from reading the majority's opinion. *See, e.g.*, Maj. Op. at 14. The Plan addresses only the Department's selection of firefighters from among those applicants who passed the 1984 exam. The Plan states simply that the racial composition of each entering class hired from the 1984 test must reflect the racial makeup of the qualified applicants for the job, and since the District knew the exact number of qualified black applicants (the 1984 exam having been administered almost one year *before* the Plan's submittal to the district court), the Plan states the relevant figure—60%. Thus, while the Plan was intended to achieve compliance with D.C. Law 1-63 and to further statutory objectives, contrary to the majority's understanding, this intention does not condemn the Plan under Title VII. *See* Maj. Op. at 15 n.11. Attaining racial parity with the D.C. workforce remains the Department's long-term goal, but it is just that—a long-term goal. Like the long-term goal of the affirmative action plan endorsed by the Supreme Court in *Johnson*, it is "merely a statement of aspiration wholly without operational significance." *Johnson*, 107 S. Ct. at 1464 (O'Connor, J., concurring). The Plan's short-term goal, which is what we are reviewing in the instant case, is, like the plan at issue in *Johnson*, substantially more modest.

In attempting further to distinguish this case from *Johnson*, the majority distorts not only the facts of this case but also the law as enunciated by the Supreme Court. The majority implies that unless an affirmative action plan uses race only as one of numerous factors when evaluating qualified candidates—as a "plus" factor —the plan offends Title VII. *See* Maj. Op. at 13-14. Of course, this is clearly not true; contrary to the majority's intimations, Title VII does not forbid "quota" plans. In *Weber*, the seminal Title VII affirmative action case which informed and guided the Court's decision in *John-*

son, the Court sustained a quota plan. *See Weber*, *supra* (upholding plan requiring that blacks constitute 50% of new trainees). Indeed, the quota plan at issue in *Weber* established a minority set aside which far exceeded the percentage of blacks in the local labor force (39%). *See Weber*, 443 U.S. at 208. Not only did the *Johnson* Court not outlaw quota plans, but it explained that use of a quota system would only affect whether the plan needed an explicit end date. *See Johnson*, 107 S. Ct. at 1456 ("Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers."). *See also Ledoux*, *supra*, slip op. at 18-19. The Plan at issue in this case was indeed temporary; it was to last for 18 months, a factor which the District Court correctly interpreted as supporting the Plan's lawfulness. *See Hammon v. Barry*, 606 F. Supp. 1082, 1093 (D.D.C. 1985).

Despite the majority's attempt to limit *Johnson*'s damage to the Title VII affirmative action jurisprudence espoused in its prior opinion, the majority's construction of the law falls like a house of cards under the weight of the Supreme Court's holding. The majority contends that *Johnson* squares with its previous declaration that Title VII requires a "predicate of discrimination" before an employer may adopt an affirmative action plan. *See* Maj. Op. at 16-18. Indeed, the majority asserts that the *Johnson* Court agreed that "evidence of the effects of [an employer's] past or current discrimination is a prerequisite to lawful race-conscious employment decisions." *Id.* at 5 n.1. This statement totally misapprehends the factual setting of *Johnson*. There was absolutely *no* evidence of past or current discrimination by the employer in *Johnson*; in fact, the district court made an express finding that the employer had not discriminated in the past, and was not presently discriminating against women in regard to employment opportunities. *See Johnson v. Transportation Agency, Santa Clara County, California*, 770 F.2d 752, 758 & n.4 (9th Cir.

1984). For Title VII purposes, there need be no showing at all regarding the employer's past or current discrimination, although such a showing certainly strengthens the employer's justification for adopting an affirmative action plan. *See Johnson*, 107 S. Ct. at 1453 & n.11. The Court held in *Johnson* that it is sufficient for a public employer to show manifest *statistical* imbalance in its workforce to meet Title VII's requirement that the employer's affirmative action plan be remedial.

C. *Application of Johnson to the Instant Case*

Realizing that it can no longer censure the Plan based on its previous conclusion that there is no predicate of discrimination, the majority changes tacks and assails the statistics. The majority now concludes that no "manifest imbalance" exists in the racial composition of the District Fire Department. *See* Maj. Op. at 8-13. The court reaches this conclusion by the most incredible obliviousness to the essential facts and a wholly improper overriding of the District Court's findings. There is a manifest imbalance in the racial composition of the Fire Department's uniformed fireforce; there is a history of overt discrimination in the Department; there is evidence of *recent* discrimination, particularly regarding the disparate impact of the Department's entry level exam. I recounted this evidence in detail in my previous dissent and will not reiterate it here. *See Hammon*, 813 F.2d at 441-44. I am constrained, however, to respond to several of the majority's most recent fact-findings.

The majority's "finding" of no manifest imbalance in this case hinges on its assertion that the percentage of blacks in the District's fireforce should be compared to the racial composition of the "Washington metropolitan area," contrary to the District Court's explicit conclusion that this was not the appropriate benchmark for assessing minority representation in the Fire Department. *Compare* Maj. Op. at 10 *with Hammon*, 606 F. Supp.

at 1091-92. It is obvious why the majority must hang its hat on this reference point: if any other figure is used, there is clearly a manifest racial imbalance in the Department's workforce. The majority's new position is ill-gotten.

Use of the Washington metropolitan area as the statistical basis for measuring minority representation in the Fire Department is improper, and the District Court wisely rejected it. As the majority notes, this area, which includes the suburbs surrounding Washington, is less than 30 percent black. Presumably the same suburbanites that are free to seek jobs with the Fire Department are free to seek jobs with other departments of the District government. Yet, curiously, the percentage of blacks in the District government generally has always closely approximated the percentage of blacks in the *District* workforce. Not so with the Fire Department (or, for that matter, the Police Department); there, blacks have always been grossly underrepresented. From 1964 to 1969, for example, the percentage of blacks among the District's total employees ranged from 50.3 to 60.7 percent respectively. Over the same time period, the percentage of blacks among uniformed firemen ranged from 14 to 19.2 percent respectively. More recently, in 1977, when D.C. Law 1-63 was passed, blacks comprised 67.4 percent of the District's employees overall, but only about 27 percent of the fireforce. If the court were examining the minority representation of the District's employees at large, there is no question that the Washington metropolitan workforce would *not* be the proper benchmark. *See Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 823-24 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982). It is quite obvious that there is no relationship between the racial composition of the Washington metropolitan area and the racial composition of the District's employees. One can imagine the Silver Spring or McLean fire departments using the black population of the

District to enlarge its minority hiring base. But the literature does not record that happening. The proper reference is not the Washington metropolitan area, despite the fact that traffic and commerce flow freely from the District to Maryland and Virginia. And why the great distinction in minority representation between the Fire Department and the District government at large? Surely, much has to do with the Fire Department's segregative practices, which continued into the early 1970's; with the discrimination in recruitment and hiring, of which the Department was found guilty in 1972; with the use of the apparently invalid Test 21 during the 1970's and, contrary to the majority's unsupported assertion, its apparent use as a rank-ordered selection technique. *See Hammon*, 813 F.2d at 433-35 (Mikva, J., dissenting). All these practices had adverse effects on minority hiring. By cavalierly asserting that the Washington metropolitan area is the relevant labor market and then concluding that minorities are *over*represented in the Fire Department, the majority adds gratuitous insult to grievous injury.

The history of black representation in the District government generally and the distortion between those historical figures and the history of minority representation in the Fire Department suggest that the District workforce would serve as a more appropriate benchmark for assessing whether there is a manifest imbalance in the racial composition of the Department. The majority offhandedly rejects this benchmark without discussing the compelling evidence that something was very much amiss in the Fire Department's hiring practices. *See* Maj. Op. at 12. Nor does the majority acknowledge that use of the local labor force as a reference appears to comport with the Supreme Court's analysis in *Johnson*. *See* 107 S. Ct. at 1446, 1447 n.4 (comparing the percentage of women in the county agency's employ with the percentage of women in the general labor force of the *county*

without inquiring whence the agency's employees actually hail). As I observed in my dissent from the majority's prior opinion, the imbalance is striking from this perspective: although blacks comprise over 65 percent of the local labor force, they comprise only 38 percent of the Department's uniformed force. *See Hammon*, 813 F.2d at 441-42.

In any event, the majority is unjustified in overturning the benchmark employed by the district court—the applicant pool—to which appellant, the Department of Justice, did not object below. *See Hammon*, 606 F. Supp. at 1091. The Supreme Court has explicitly endorsed the use of such an applicant pool as evidence of the relevant labor market. *See Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977). *See also United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). Since the early 1970's, the applicant pool has consistently been well over 55 percent black. In 1980, it rose to 74.53 percent; in 1984, 64.6 percent of the applicants were black. Yet, as late as 1984, only 37 percent of the District's fireforce was black. (In the 1970's the percentage averaged about 25. *See Hammon*, 813 F.2d at 435 (Mikva, J., dissenting).) It is ridiculous for the majority to herald the number of blacks hired by the Department between 1981 and 1984. *See* Maj. Op. at 8. The District was doing what the majority now forbids it from doing. The District's hiring during those years was directed by the District's Office of Human Rights, which had found that the 1981 test discriminated against blacks and had ordered the District to hire *all* of the applicants who passed the test; obviously, the percentage of blacks hired would mirror the percentage of black applicants. In adopting the Plan, the District is trying to do the exact same thing with regard to the 1984 test—avoid discriminating against minorities. The majority commends the District for the results of its most recent hiring practices and then condemns it for the practice. That

is as absurd as it sounds. A fair comparison of either the applicant pool (the benchmark used by the district court and accepted by the parties) or of the area workforce to the Department's workforce reveals a manifest imbalance in the Fire Department's uniform fireforce. While Judge Silberman's statement mixes up the sources of the confusion, it matters not. Under either his "stock" or "flow" category, the imbalance is obvious. Both Judge Starr and Judge Silberman insist on using the one set of figures that does mix up the issue, namely, the percentage of new hires in 1984. That percentage is very high and very appropriate; it comes from the very plan that the majority strikes down. If Judge Starr and Judge Silberman think that percentage was such an admirable rate of hiring, I cannot understand why they want to keep the District from maintaining that level of hiring.

Under *Johnson*, such a manifest imbalance is a sufficient factual predicate to justify use of race-conscious employment practices. *See Johnson*, 107 S. Ct. at 1452; *Ledoux*, slip op. at 20. But there is more evidence to support the District's adoption of the Plan. Thus, the remedial predicate in this case is far stronger than that evidenced in *Johnson*. Although the majority protests that it will not bury its head in the sand, ostrich-like, *see* Maj. Op. at 12 & n.8, it has buried its whole corpus in ignoring, if not trivializing, the evidence of unlawful discrimination in the Fire Department, with which the District Court was, in its own words, "intimately familiar." *Hammon*, 813 F.2d at 435 (Mikva, J., dissenting) (citation omitted). The majority pretends that there have been happy times in the District's Fire Department since the time of the Korean Conflict. Those black firefighters subjected to the Department's humiliating overt discriminatory practices, such as separate beds and eating utensils, during the 1950's, '60's, and '70's; those black firefighters who instituted and won their discrimination charges against the Department in 1972; those

black firefighters who during the 1970's, despite the fact that they had passed the entry-level exam, had to wait years later than nonminorities before being hired; those black applicants who experienced the District's unlawful use of an unvalidated exam in 1981; and those black firefighters who brought suit in 1984 in order to ensure that the Department would hire its fireforce in a manner that did not discriminate against minorities—all those black firefighters might understandably not recognize the pretty picture the majority paints. They weren't happy with the plantation, no matter how good the separate but equal food, no matter how comfortable the separate but equal sleeping facilities, no matter how seemingly well-intentioned the unequal hiring practices.

As a final point, I observe that the majority has wholly abandoned the second prong of *Johnson*'s two-part test. After intoning the inquiry it must make—whether the employer's plan unnecessarily trammels the legitimate interests of nonminority employees, *see Ledoux*, slip op. at 16—the majority simply states that because the District failed to consider available race-neutral alternatives, it cannot pass this second hurdle. *See* Maj. Op. at 18-19. The district court specifically found that there *were no such alternatives available. See Hammon*, 606 F. Supp. at 1093-94. We, as an appellate court, are in no position to engage in the fact-finding that would be necessary to overturn the lower court's finding. The majority's conclusion to the contrary is based primarily on an unsupported assertion made at oral argument. To the extent the majority located tests employed by fire departments that have been found valid for other jurisdictions, *see Hammon*, 813 F.2d at 429 n.35, it cannot casually be presumed that the examinations are "portable" to the District. In any event, the majority's reasoning is irrelevant to the inquiry the Supreme Court has directed it to conduct. The *Johnson* Court did not require that there be no race-neutral alternatives available before an employer may voluntarily adopt an affirmative action plan;

in fact, there was no discussion whatever in *Johnson* of possible alternatives to the Santa Clara plan. The Court did list several factors that are relevant to the court's inquiry, such as whether the plan creates an absolute bar to the advancement of nonminorities, is designed to attain (as opposed to maintain) racial balance, or deprives nonminorities of "legitimate firmly rooted expectation[s]." 107 S. Ct. at 1451, 1455. *See also Ledoux*, slip op. at 17 (noting that, among other things, "the *type* of preferential remedy chosen by the employer is critical in determining whether the plan is unduly burdensome"). The majority fails to consider any of these factors, all of which support the Plan's lawfulness. *See Hammon*, 813 F.2d at 444-46 (Mikva, J., dissenting). Instead, the majority clings to a consideration which is not only unsound as a matter of fact, but, more importantly, totally irrelevant as a matter of law.

CONCLUSION

The Supreme Court's opinion in *Johnson* makes it plain for almost all to see that the United States has failed to carry its burden in seeking to strike down the Fire Department's Plan. The Plan is designed to rectify past patterns of discrimination and to remove artificial and unnecessary barriers to employment; it goes but a small way toward remedying the underrepresentation of minorities in the District's uniformed fireforce by preventing the use of the 1984 entry level exam in a way that would discriminate against blacks. Despite the legitimate remedial purposes of the Plan's short-term goals, and without a mention of the burden of the Plan might or might not place on the legitimate interests of nonminority firefighters, the majority sees fit to strike down the District's attempts to rid its Fire Department of the vestiges of discrimination. The "cheery" times the majority trumpets have not arrived; indeed, the majority's opinion pushes them farther beyond the horizon. I dissent from the denial of the petition for rehearing.